Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 2000

MOTOR CARGO, INC.

Petitioner

v.

THOMAS ROBERTSON

On Petition For Writ Of Certiorari
To The Court Of Appeals Of Arizona

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals of Arizona err in construing federal law in such a manner as to impose a greater scope of liability on a motor carrier with respect to the operation of motor vehicles pursuant to a lease than the carrier would bear with regard to the operation of its own vehicles?

2. Did the Court of Appeals of Arizona err in construing a jurisdictional statute exempting motor carriers from federal regulation with regard to the transport of certain freight?

PARTIES AND CORPORATE DISCLOSURE STATEMENT

A. Parties

The parties to the proceeding in the Court of Appeals of Arizona are the same parties noted in the caption of this petition.

B. Corporate disclosure statement

Petitioner Motor Cargo, Inc. is a wholly owned subsidiary of Motor Cargo Industries, its parent. Motor Cargo Industries is a publicly traded company.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES AND CORPORATE DISCLOSURE STATEMENT ii

A. Parties ii

B. Corporate disclosure statement ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

CITATIONS OF OPINIONS AND ORDERS 1

STATEMENT OF BASIS FOR JURISDICTION 2

STATUTES AND REGULATIONS INVOLVED IN THE CASE 2

A. Leasing statute 2

B. Control regulation 3

C. Pallet exemption 4

D. Applicability of pallet exemption 4

STATEMENT OF THE CASE 5

A. Substantive facts 5

B. Procedural facts and references to federal questions 7

ARGUMENT 12

A. Federal carrier leasing regulations 14

B. The pallet exemption to federal leasing regulations 24

CONCLUSION 30

TABLE OF AUTHORITIES

FEDERAL CASES

Braxton v. United States, 500 U.S. 344 (1991)..... 12-13

Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984).....20

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)....11

Gudgel v. Southern Shippers, Inc., 387 F.2d 723 (7th Cir. 1967) 16

Henslin v. Roaasti Trucking, Inc., 69 F.3d 995 (9th Cir. 1995) 26

Henslin v. Roaasti Trucking, Inc., 815 F. Supp. 1347, (E.D. Cal. 1993).....28, 29, 30

I.C.C. v. Mr. B's Servs., Ltd., 934 F.2d 117 (7th Cir. 1990) 27

C.C., Individually v. Roadrunner Trucking, Inc., 823 F. Supp. 913 (D. Utah 1993)..... 18-19

Mellon National Bank & Trust Co. v. Sophie Lines, Inc., 289 F.2d 473 (3rd Cir. 1961) 15

Penn v. Virginia International Terminals, Inc., 819 F. Supp. 514 (E.D. Va. 1993) 23, 24-25

Planet Ins. Co. v. Transport Indemnity Co., 823 F.2d 285 (9th Cir. 1997).....15

Price v. Westmoreland, 727 F.2d 494 (5th Cir. 1994).....15

Rodriguez v. Ager, 705 F.2d 1229 (10th Cir. 1983) 15

TransAmerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc., 423 U.S. 28 (1975).....19

Vance Trucking Co. v. Canal Ins. Co., 249 F. Supp. 33 (D. S.C. 1966).....27

Wellman v. Liberty Mutual Ins. Co.,
496 F.2d 131 (8th Cir. 1974) 15

Wilcox v. TransAmerican Freight Lines, Inc.,
371 F.2d 403 (6th Cir. 1967) 16

STATE CASES

Brannaker v. TransAmerican Freight Lines, Inc., 428 S.W.2d 524 (Mo. 1968) 16

Cincinnati Ins. Co. v. Haack,
708 N.E.2d 214 (Ohio Ct. App. 1997)..... 15-16

Parker v. Erixon,
473 S.E.2d 421 (N.C. Ct. App. 1996)..... 23, 24-25

Robertson v. Motor Cargo, Inc.,
3 P.3d 1046 (Ariz. 1999) 1, 15

Wilson v. Riley Whittle, Inc.,
701 P.2d 575 (Ariz. 1985) 17

FEDERAL STATUTES

28 U.S.C. § 1257(a) 2

49 U.S.C. § 304(e) 3

49 U.S.C. § 304(f).....27

49 U.S.C. §§ 10501-10561 25

49 U.S.C. § 10521.....25

49 U.S.C. § 10526.....4, 26

49 U.S.C. § 10526(a)(11).....4, 27, 28

49 U.S.C. § 10528..... 4-5, 28, 29

49 U.S.C. § 10922(b).....28

49 U.S.C. § 11107.....3

49 U.S.C. § 13501.....25

49 U.S.C. §§ 13501-13541 25-26

49 U.S.C. § 13506 ..... 4, 27

49 U.S.C. § 13506(a)(11) 4, 26, 27

49 U.S.C. § 13507 ..... 4, 28, 29

49 U.S.C. § 14102 ..... 2, 3, 17, 21

49 U.S.C. § 14102(a)(4) 2-3, 23

FEDERAL REGULATIONS

49 C.F.R. § 376.12 ..... 3, 4

49 C.F.R. § 376.12(c)(1) 3, 4, 17, 18

49 C.F.R. § 376.12(c)(4) 20-21

49 C.F.R. § 1057.12 4

LEGISLATIVE HISTORY

H.R. No. 95-1395 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3009. 3

H.R. Rep. No. 96-1069 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2283 ..... 26, 27, 29, 30

OTHER AUTHORITIES

Ex Parte No. MC-43 (Sub 16), Lease and Interchange of Vehicles (Identification Devices), 3 I.C.C.2d 92 (1986) 19, 20

Ex Parte No. MC-43 (Sub-No. 20), Petition to Amend Lease and Interchange of Vehicles Regulations--Declaratory Order, 1994 WL 70557 (March 8, 1994) 23

Ex Parte No. MC-203, 1992 WL 6625 (January 13, 1992) (slip op.) 20

Ex Parte No. MC-203, Petition to Amend Lease and Interchange of Vehicle Regulations, 8 I.C.C.2d 669 (1992) 21, 22

Lease and Interchange of Vehicles by Motor Carriers, 52 M.C.C. 675 (1951) 18-19

Paul Stephen Dempsey, *Congressional Intent and Agency Discretion--Never the Twain Shall Meet: The Motor Carrier Act of 1980*, 58 Chi. Kent L.Rev. 1 (1981) 26-27, 29

Revised I.C.A., Pub. L. No. 95-473, 97 Stat. 1420 (1978) 3

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CITATIONS OF OPINIONS AND ORDERS

The decision on appeal is an opinion by the Court of Appeals of Arizona entered on November 30, 1999. It appeared initially as a published decision: *Robertson v. Motor Cargo, Inc.*, 197 Ariz. 126, 3 P.3d 1046, Fed. Carr. Cas. ¶ 84,120, 209 Ariz. Adv. Rep. 7 (1999) ("Ariz. Op."). The opinion is reproduced in the appendix to this petition at pp. 1a-21a.

Motor Cargo, Inc. ("Motor Cargo"), filed a petition for review of the referenced decision with the Supreme Court of Arizona. On May 23, 2000 the Supreme Court of Arizona granted Motor Cargo's petition. The parties briefed Motor Cargo's appeal, and motor carrier industry *amici curiae* filed a brief regarding the federal issues raised in the case. The Supreme Court of Arizona then heard oral argument.

Thereafter, on December 18, 2000, in *Robertson v. Motor Cargo, Inc.*, 14 P.3d 997 (Ariz. 2000), the Supreme Court of Arizona issued a summary order vacating its previous order granting review; dismissing, *i.e.*, denying, Motor Cargo's petition for review; and mandating that the previously published decision of the Court of Appeals of Arizona should be de-published. The summary order is reproduced in the appendix to this petition at pp. 22a-23a.

STATEMENT OF BASIS FOR JURISDICTION

The decision of the Supreme Court of Arizona vacating its previous order granting review and denying Motor Cargo's petition for review was entered on December 18, 2000. (Appendix at p. 22a-23a.) There was no petition for rehearing.[1] Accordingly, as of December 18, 2000, and with regard to the federal questions here presented, the November 30, 1999 decision of the Court of Appeals of Arizona became the final decree of the highest court of a State in which a decision could be had.

28 U.S.C. § 1257(a) provides this Court with the jurisdiction necessary to review the decision of the Court of Appeals of Arizona.

STATUTES AND REGULATIONS INVOLVED IN THE CASE

There are three federal statutes and one federal regulation primarily at issue.

A. Leasing statute

As to the scope of a motor carrier's liability for the negligence of a non-employee operating a leased motor vehicle, 49 U.S.C. § 14102, specifically 49 U.S.C.

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[1] Under Arizona procedural law, a motion for reconsideration of an order denying a petition for review is not allowed unless permitted by specific order of the court. Ariz. R. Civ. App. P. 22(d).

§ 14102(a)(4), is at issue. 49 U.S.C. § 14102 is reprinted in the appendix to this petition at pp. 24a-25a.

49 U.S.C. § 14102 is a recodification of 49 U.S.C. § 11107, the statute in effect in 1993 when the plaintiff below allegedly suffered an injury giving rise to this case. Recodification of 49 U.S.C. § 11107 took place in 1995 with adoption of the I.C.C. [Interstate Commerce Commission] Termination Act. That recodification worked only minor revisions to the text of 49 U.S.C. § 11107. None of those revisions affects the present analysis.

49 U.S.C. § 11107 was itself a revised restatement and recodification of 49 U.S.C. § 304(e). 49 U.S.C. § 304(e), which was revised and recodified into 49 U.S.C. § 11107 in 1978,[2] was quoted in part and discussed by the Court of Appeals of Arizona in the decision that Motor Cargo is asking this Court to review.

B. Control regulation

The leasing regulation here at issue is 49 C.F.R. § 376.12, in particular 49 C.F.R. § 376.12(c)(1). 49 C.F.R. § 376.12 is reprinted in the appendix to this petition at pp. 26a-36a.

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[2] Revised I.C.A., Pub. L. No. 95-473, 92 Stat. 1420-21 (1978); H.R. No. 95-1395, at 139 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3009, 3148.

In the opinion of the Court of Appeals of Arizona here at issue, the court cited to 49 C.F.R. § 1057.12. 49 C.F.R. § 1057.12, however, had been relocated to 49 C.F.R. § 376.12 by the time the court made its decision. 49 C.F.R. § 376.12(c)(1) is commonly known as the "control regulation."

C. Pallet exemption

An exemption from federal leasing regulations for the transport of pallets is found in 49 U.S.C. § 13506, in particular 49 U.S.C. § 13506(a)(11). 49 U.S.C. § 13506 is reprinted in the appendix to this petition at pp. 37a-42a.

A recodification affected the pallet exemption as well. At the time of the injury alleged by the plaintiff below, the pallet exemption was found at 49 U.S.C. § 10526, specifically 49 § 10526(a)(11). The pallet exemption was recodified as part of the I.C.C. Termination Act of 1995.

D. Applicability of pallet exemption

A statute affecting the applicability of the pallet exemption appears at 49 U.S.C. § 13507. 49 U.S.C. § 13507 is reprinted in the appendix to this petition at p. 43a.

49 U.S.C. § 13507 was recodified without substantive modification as part of the I.C.C. Termination Act of 1995. Formerly it appeared at 49 U.S.C. § 10528,

which was in effect at the time when the plaintiff below claims to have suffered his injury.

STATEMENT OF THE CASE

A. Substantive facts

This case arises from a 1993 injury allegedly suffered by the plaintiff below, Thomas Robertson. According to Mr. Robertson, he was injured while he was unloading used pallets out of a truck's trailer. The truck's trailer was owned by Motor Cargo, a long-haul freight transportation company.

Mr. Robertson sued several parties, including Motor Cargo. That Mr. Robertson came into contact with a Motor Cargo trailer was purely by chance. The trailer was supposed to be used by Kifsco, Inc. ("Kifsco"), only pursuant to a cartage agreement with Motor Cargo. By way of the cartage agreement, Motor Cargo had engaged Kifsco to pick-up and deliver freight to be moved between two points in Arizona.[3]

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[3] Without any analysis, the Court of Appeals of Arizona assumed that the cartage agreement was to be analyzed as if it were a lease agreement subject to federal regulation covering interstate carriage. While Motor Cargo disputed the characterization of its agreement with Kifsco, which was for the transport of freight between two points in Arizona only, and which in any event did not contemplate the unauthorized shipment at issue, the lower court ignored

On the day in June 1993 when Mr. Robertson allegedly suffered his injury, Kifsco, pursuant to its cartage agreement with Motor Cargo, was scheduled to haul goods from its Flagstaff, Arizona terminal to a hardware store in Prescott, Arizona. Kifsco was to use its driver, its tractor, and Motor Cargo's trailer.

As Motor Cargo would later learn, the brother of the owner of Kifsco operated a side business out of Kifsco's terminal. That business was called Northern Arizona Pallets ("NAP"). NAP collected and sold wooden pallets to various businesses. NAP had no connection to Motor Cargo whatsoever, by way of contract or otherwise, nor had it (or Kifsco) leased Motor Cargo's trailer.

Though NAP had no right to use Motor Cargo's trailer for any purpose, on the day in question one of its employees opted to use one of Motor Cargo's trailers for NAP business. An NAP customer had ordered a quantity of pallets to be delivered to Ashfork, Arizona. Without authorization either from Kifsco or from Motor Cargo, NAP's employee loaded the pallets onto a Motor Cargo trailer. He then hitched that trailer onto the Motor Cargo trailer that was to be used legitimately to haul goods

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these points. Hence, this petition proceeds as if a federally

pursuant to the Motor Cargo-Kifsco cartage agreement. The side deal was complete when the NAP employee paid Kifsco's driver $50 to deviate from her route in order to deliver the pallets.

The truck driver left Flagstaff and detoured to Ashfork. Arriving at NAP's customer's place of business, the driver unhitched the second Motor Cargo trailer carrying the pallets and left. She was on her way to Prescott, where she was supposed to go in the first place, when Mr. Robertson opened the back of the trailer carrying the pallets, leading to the chain of events that caused his alleged injury.

B. Procedural facts and references to federal questions

Mr. Robertson sued several parties to redress his alleged injuries. Defendants included NAP's owner and the NAP employee who loaded the pallets onto Motor Cargo's trailer, Kifsco, Kifsco's driver, and Motor Cargo.

Mr. Robertson did not plead federal law in his complaint. Instead he proceeded on a state common-law theory that somehow, Motor Cargo should have liability for the actions of Kifsco's driver even though she had deviated

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regulated lease were at issue.

from her legitimate duties in delivering the pallets to Ashfork.

Motor Cargo moved for summary judgment, demonstrating that there was no theory of common-law agency or vicarious liability which would render Motor Cargo accountable for Mr. Robertson's alleged injury. Mr. Robertson filed a cross-motion for summary judgment. In his reply brief in support of his cross-motion for summary judgment, Mr. Robertson discussed some of the federal leasing law here at issue, though he argued merely that its principles ought to apply by analogy. (Appendix at pp. 4a, 6a-8a, 44a-48a.) In the end, Motor Cargo won its motion and Mr. Robertson lost his cross-motion.

Mr. Robertson continued to press his case. All parties but NAP's owner, NAP being a sole proprietorship, defaulted or were otherwise dismissed. Then, in spite of having entered into a covenant not to execute against NAP's owner, Mr. Robertson proceeded to a so-called summary jury trial against NAP's owner on the question of liability and damages.

At the summary trial, where no evidence was taken live, but only opening and closing statements were given, and where the only parties to participate were Mr. Robertson and NAP's owner, the jury determined that NAP

and its owner were not at fault. Instead, the jury determined that the absent Kifsco was 100% at fault.

After judgment was entered against Kifsco, and after judgment was formally entered in Motor Cargo's favor *nunc pro tunc*, Mr. Robertson appealed the judgment dismissing Motor Cargo. Thereafter, Mr. Robertson asked the Court of Appeals of Arizona, where his appeal was pending, to remand the case back to the trial court, so that he could file a motion attacking the trial court's grant of summary judgment to Motor Cargo. Mr. Robertson had discovered belatedly that he wished to pursue theories of recovery directly under federal law dealing with carrier leases. The court of appeals remanded the case as requested, and Mr. Robertson filed his motion to set aside the summary judgment in favor of Motor Cargo. Essentially Mr. Robertson blamed Motor Cargo for his own failure to devise a way in which he could attempt to prosecute his claims under federal leasing law—law which Motor Cargo has always believed ought not to apply in this case. Mr. Robertson's motion was denied.

Mr. Robertson appealed the trial court's decision denying his motion to set aside, and that appeal was consolidated with his earlier appeal from Motor Cargo's summary judgment. In his brief to the Court of Appeals of Arizona, Mr. Robertson argued that federal leasing law

ought to apply directly. (Appendix at pp. 6a-8a.) He did not, however, demonstrate how the events in question satisfied the jurisdictional requirements for coverage by the federal law he invoked. Motor Cargo countered Mr. Robertson's arguments, addressing the federal questions raised. (*Id.* at pp. 11a-17a.)

After briefing and oral argument, the Court of Appeals of Arizona reversed the summary judgment granted to Motor Cargo and remanded to the trial court "for entry of summary judgment holding Motor Cargo liable for Robertson's injuries caused by Kifsco."[4] The court based its ruling purely on federal leasing law, albeit on a misconstruction of the substantive and jurisdictional aspects of that law. (See generally Appendix at pp. 1a-21a.)

Motor Cargo then filed a petition for discretionary review with the Supreme Court of Arizona. The petition addressed the federal questions belatedly raised by Mr. Robertson and the federal law relied upon by the Court of Appeals of Arizona as the basis for its opinion. Seven Western State trucking associations appeared as *amici curiae* and filed a brief seeking resolution of the

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[4] *See* Appendix at p. 21a.

troublesome legal issues raised by the lower courts' decision. Mr. Robertson responded to both briefs, addressing the federal questions raised.

After briefing was joined and oral argument heard, the Supreme Court of Arizona on December 18, 2000 issued its order withdrawing its grant of review, denying Motor Cargo's petition for review, and ordering that the opinion of the court of appeals be de-published. Thus, with regard to the federal questions addressed, on December 18, 2000 the decision of the Court of Appeals of Arizona became the final decision[5] of the highest State court in which review could be had by Motor Cargo.

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[5] While the parties disagree as to whether the decision means that Motor Cargo must now pay damages assessed against Kifsco to Mr. Robertson—litigation on that point is ongoing in the Arizona trial court as this petition is being written—there can be no doubt that insofar as construction and application of the federal laws discussed in this petition are concerned, the court of Motor Cargo's last resort has spoken in final terms. Accordingly, and in light of one reading of the State court's decision, this petition is ripe for disposition. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-79 (1975) (decision on federal issue deemed final for review purposes where, though "there are further proceedings—even entire trials—yet to occur in the state courts . . . for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained").

ARGUMENT

Motor Cargo petitions this Court for a writ of certiorari regarding a decision of the Court of Appeals of Arizona construing federal transportation law. This petition presents two questions of grave concern to the nation's motor carrier industry. With regard to the first question presented, diametrical conflicts exist among the Circuit Courts of Appeal, and among State courts, such that this case is four-square within the ambit of those controversies which call for resolution by this Court.[6] The second question involves an important point of federal law that has not yet been, but should be, addressed by this

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Here, Mr. Robertson contends strenuously that the Court of Appeals of Arizona has issued a final decision as to all issues of liability and damages. (*E.g.*, Appendix at pp. 49a-52a.) Under these circumstances, Motor Cargo has no choice but to bring this petition at this time. If Motor Cargo were to delay in bringing this petition, it would run the risk that Mr. Robertson might successfully contend later that Motor Cargo had let lapse the 90-day period in which a petition for writ of certiorari can be filed. Then there might be no opportunity for review of the important federal issues here at play.

[6] As this Court has written, "[a] principal purpose for which [the Court uses its] certiorari jurisdiction . . . is to resolve conflicts among United States courts of appeals and state courts concerning the meaning of provisions of federal

Court. This Court's review is needed and appropriate under its rules.[7]

More specifically, this case concerns the federal regulation of motor carrier leasing. As to the first question presented, appellate courts construing the same federal statute and regulation have come to opposite determinations of what they mean. In some federal circuits and States, the law has been read to strip motor carriers of virtually all defenses to allegations of negligence against employees of companies with whom the carriers have entered into leasing arrangements for the transport of goods. In other federal circuits and States, the law has been read to preserve defenses based on traditional common-law principles of *respondeat superior*, as, in Motor Cargo's view, Congress intended. This stark divergence in views of the law is especially troublesome in an industry whose business it is to traverse the United States.

With regard to the second question presented, the State court of last resort in this case has decided a question of federal jurisdiction in such a way that would obliterate a

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law." *Braxton v. United States*, 500 U.S. 344, 347 (1991) (citing Sup. Ct. R. 10.1).

[7] Sup. Ct. R. 10 (c).

statutory exemption from the sweep of federal regulation here at issue.[8] The State court's policy reasoning is hubristic; the court would substitute its wisdom for the plain directive of Congress. This Court has not yet construed the jurisdictional exemption at issue.

Though the jurisdictional question is a threshold one, it will be addressed second in this petition because in Motor Cargo's view the conflict in construing carrier leasing regulations has by far the greater potential for widespread ill effect. Interstate freight carriers ought to have the expectation that federal law will be construed uniformly in the various judicial circuits and States through which they transport the nation's goods. The current cacophony of views on an important matter such as the scope of carrier liability serves no one, the wider public included.

A. Federal carrier leasing regulations

With regard to the carrier leasing regulations, United States Courts of Appeal for the Third, Fifth, Eighth,

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[8] Though the court's decision was ordered de-published, it is easily accessed both by litigants and courts throughout the country in this age of computerized research services. If the decision were allowed to stand, it would embolden more courts to disregard any of the other myriad

and Tenth Circuits, and the State court of last resort here,[9] as well as other appellate courts, have opined that as a general matter federal law requires the imposition of absolute liability on a licensed motor carrier that is party to a lease for the transport of freight. According to this view of federal law, the lessor's employees are considered employees of the carrier-lessee, vicarious liability is assumed as a matter of law, and common-law principles of *respondeat superior* do not apply.[10] Thus, if a federally

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exemptions to coverage built into the federal regulatory scheme.

[9] *E.g.*, *Planet Ins. Co. v. Transport Indemnity Co.*, 823 F.2d 285, 288 (9th Cir. 1997); *Price v. Westmoreland*, 727 F.2d 494, 496 (5th Cir. 1994); *Rodriguez v. Ager*, 705 F.2d 1229, 1236 (10th Cir. 1983); *Wellman v. Liberty Mutual Ins. Co.*, 496 F.2d 131, 136 (8th Cir. 1974); *Mellon National Bank & Trust Co. v. Sophie Lines, Inc.*, 289 F.2d 473, 477-78 (3rd Cir. 1961); *Robertson*, unpublished decision referenced herein.

[10] For an excellent discussion of the interplay between the doctrines of vicarious liability and *respondeat superior*, *see Cincinnati Ins. Co. v. Haack*, 708 N.E.2d 214, 218 (Ohio Ct. App. 1997). Though this case takes a view opposite Motor Cargo's on the central issue of the scope of a carrier-lessee's liability under federal regulations, it nicely elucidates a critical point: that under the traditional analysis, even if a lessor's employee were deemed to be the employee of a carrier-lessee, such that vicarious liability were a possible conclusion, a second, critical step requires consideration of the principles of *respondeat superior*. 708

licensed carrier enters into a transportation lease whereby the lessor agrees to carry freight at the behest of the carrier, then the carrier must answer for all negligence of the lessor or the lessor's employee, even if—as here—the lessor's employee commits a negligent act while deviating without authorization from his or her legitimate duties.

But as demonstrated by the opinions of United States Courts of Appeal for the Sixth and Seventh Circuits, and of the Supreme Court of Missouri,[11] among other

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N.E.2d at 218. *Respondeat superior* looks to whether the employee was acting within the scope and course of his or her employment when the act in question occurred. *Id.*

[11] *See Wilcox v. TransAmerican Freight Lines, Inc.*, 371 F.2d 403, 404 (6th Cir. 1967) (carrier-lessee not liable when lease driver was neither engaged in the carrier-lessee's business nor doing anything to benefit the carrier-lessee at the time of the accident); *Gudgel v. Southern Shippers, Inc.*, 387 F.2d 723, 725 (7th Cir. 1967) ("A common carrier operating under an Interstate Commerce Commission certification is liable for the negligence of an independent contractor operating equipment leased to the carrier, if the contractor is operating by authority of the carrier's I.C.C. certificate *and is carrying out the carrier's undertaking*." (emphasis added)); *Brannaker v. TransAmerican Freight Lines, Inc.*, 428 S.W.2d 524, 529 (Mo. 1968) ("The legislative intention was to put the use and operation of leased vehicles on a parity with equipment owned by the authorized carrier and operated by its employees.").

courts, and in light of pronouncements of the administrative body that authored the leasing regulation here at issue, this view of federal law is wrong. Per their plain language, the leasing regulation and statute giving rise to it do not create the anomaly whereby a carrier incurs a greater scope of liability for the negligent acts of a lessor's employee than the carrier would incur for its own employee. To the contrary: the statute and regulation (and their predecessors) merely provide that where the federal leasing laws apply, the carrier shall have the same measure of responsibility to the public vis-à-vis the lessor's employee as the carrier has vis-à-vis its own employee.[12]

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Even another division of the Court of Appeals of Arizona disagrees with the division of the court deciding the instant case. *See Wilson v. Riley Whittle, Inc.*, 701 P.2d 575, 579 (Ariz. 1985) ("Under the federal statutes and regulations *the liability of the trucking company is no greater than that which exists under the doctrine of respondeat superior*." (emphasis added)).

[12] *See* 49 U.S.C. § 14102 (enabling Secretary of Transportation to adopt regulations with regard to leased motor vehicles whereby the carrier, assuming jurisdiction, may be required to "have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary on safety of operations and equipment, and with other applicable law *as if the motor vehicles were owned by the motor carrier*") (emphasis added); 49 C.F.R. § 376.12(c)(1) ("The lease

Thus, if a defense based on the State common-law doctrine of *respondeat superior* is available to a carrier with regard to its own employee, as it is across the nation,[13] the federal leasing law does not abrogate it vis-à-vis the actions of a lessor's employee. Federal law is neutral after it acts to bring the scope of liability into parity. The rest is up to State law.

This Court has cited a pronouncement made by the administrative agency responsible for drafting the regulation that has become 49 C.F.R. § 376.12(c)(1). In a statement made by the I.C.C. during the period when the control regulation was drafted and adopted, the agency wrote: "It now seems to be accepted that when an authorized carrier furnishes services in vehicles owned and operated by others, *he must control the service to the same extent as if he owned the vehicles*, but need control the

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shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.").

[13] *C.C., Individually v. Roadrunner Trucking, Inc.*, 823 F. Supp. 913, 919 (D. Utah 1993) ("Where the carrier's truck is driven by the carrier's employee, state law in all

vehicles only to the extent necessary to be responsible to the shipper, the public, and this Commission for the transportation." Lease and Interchange of Vehicles by Motor Carriers, 52 M.C.C. 675, 681 (1951) (emphasis added) (cited by *TransAmerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28, 39 (1975)). From the inception, the control regulation was meant only to achieve an equality of responsibility in the carrier-lessee as to the actions of the carrier's own employees on the one hand and the actions of lessors and their employees on the other.

The I.C.C.'s view of the scope of the control regulation remained constant through the years. In 1986, for example, in the context of a discussion on carrier-identification devices as referenced by the leasing regulations here at issue, the I.C.C. stated:

> The Commission did not intend that its leasing regulations would supersede otherwise applicable principles of State, tort, contract, and agency law and create carrier liability where none would otherwise exist. Our regulations should have no bearing on this subject. Application of state law will produce appropriate results . . . . [W]e

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jurisdictions provides a remedy under the doctrine of respondeat superior.").

> repeat that our rules are not intended to influence in any fashion a court's liability determination.

Ex Parte No. MC-43 (Sub 16), Lease and Interchange of Vehicles (Identification Devices), 3 I.C.C.2d 92, 93 (1986) (reprinted in Appendix at pp. 53a-67a; quotation at p. 56a.). It is well established, of course, that an agency's interpretation of its own regulations deserves significant deference.[14] *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

And there is more agency interpretation to consider. In 1992 the I.C.C. adopted an amendment to the control regulation. It reads:

> Nothing in the provisions required by paragraph (c)(1) of this section is intended

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[14] The Court of Appeals of Arizona referenced the agency interpretation but dismissed it as inapposite. Contrary to that court's opinion, however, which would confine the I.C.C.'s interpretation to the specific sub-regulation at issue in the source decision, the I.C.C. later reaffirmed that the language in Ex Parte No. MC-43 applied to all its leasing regulations. Ex Parte No. MC-203, 1992 WL 6625 (January 13, 1992) (slip op.) (reprinted in Appendix at pp. 68a-73a) (citing Ex Parte No. MC-43 for the proposition that "[t]he [I.C.C.'s] regulations are silent on the agency status of lessors, and its decisions are clear that the I.C.C. has taken no position on the issue of independence of lessors") (quotation at p. 71a of Appendix).

> to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements.

49 C.F.R. § 376.12(c)(4).

Commenting on this amendment as proposed, the agency wrote:

> While most courts have correctly interpreted the appropriate scope of the control regulation and have held that the type of control required by the regulation does not affect "employment" status, it has been shown here that some courts and State workers' compensation and employment agencies have relied on our current control regulation and have held the language to be prima facie evidence of an employer-employee relationship.[15] These State agencies often find that the current regulation evidences the type of control that

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[15] The Court of Appeals of Arizona was apparently of the opinion that the driver-employee of Kifsco, the lessor, was Motor Cargo's employee as a matter of law. In finding vicarious liability on the part of Motor Cargo, it cited to three cases for the proposition that the control regulation created an employer-employee relationship between carrier-lessees and lessor's employees as a matter of law. (Appendix at pp. 10a-11a.)

> is indicative of an employer-employee relationship.

Ex. Parte No. MC-203, Petition to Amend Lease and Interchange of Vehicle Regulations, 8 I.C.C.2d 669, 671 (1992) (reprinted in Appendix at pp. 74a-81a; quotation at p. 78a). Dismissing the notion that the control regulation created so-called statutory-employee status on the part of a lessor's employee vis-à-vis a lessee-carrier, the I.C.C. went on to state:

> We conclude that adopting the proposed amendment will reinforce our view of the neutral effect of the control regulation and place our stated view squarely before any court or agency asked to interpret the regulation's impact. The proposed amendment should eliminate the need for such tribunals to undertake any lengthy legal analysis of the control regulation and lessen the likelihood that they will reach the wrong conclusions. By presenting a clear statement of the neutrality of the regulation, we hope to bring a halt to erroneous assertions about the effect and intent of the control regulation, saving both the factfinders and the carriers time and expense.

Id. at 671.

In other words, courts such as the lower court here which have held that the control regulation creates an employer-employee relationship between carrier-lessees

and lessor's employees are wrong. The control regulation does no such thing; therefore, it creates no vicarious liability based on the premise that, as a matter of federal law, a lessor's employee is always acting as the lessee-carrier's employee. *See* Ex Parte No. MC-43 (Sub-No. 20), Petition to Amend Lease and Interchange of Vehicles Regulations—Declaratory Order, 1994 WL 70557 (March 8, 1994) (reprinted in Appendix at pp. 82a-103a) (stating, after analysis: "[W]e repeat that our rules are not intended to influence, in any fashion, a court's liability determination.") (quotation at p. 100a of Appendix).

All the control regulation does is what Congress intended: it makes carrier-lessees responsible for the negligent acts of lessors' employees "as if the motor vehicles were owned by the motor carrier." 49 U.S.C. § 14102(a)(4). Courts that have gone further misapprehend federal law. This Court should settle the controversy among various courts by granting the petition for certiorari so that it can construe the lease statute as written and the control regulation in light of its wording and agency interpretation.[16]

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[16] None of the courts deciding cases cited by the Court of Appeals of Arizona discussed the I.C.C.'s 1986 and 1992 statements regarding the neutral impact of the

B. The pallet exemption to federal leasing regulations

Once Mr. Robertson decided that he wished to posit that federal leasing regulations mandated a holding that Motor Cargo was liable for any negligence on the part of Kifsco's employee, it was incumbent on him to demonstrate at the outset that the I.C.C. had jurisdiction over the transport in question. Mr. Robertson failed to meet this burden, but Motor Cargo raised lack of jurisdiction as a defense. As Motor Cargo demonstrated, because the freight at issue was pallets, federal law is plain: there was no I.C.C. jurisdiction; therefore, the leasing regulation relied upon by Mr. Robertson did not apply.

Nonetheless, the Court of Appeals of Arizona applied the leasing regulation, holding that adding-in to a

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(continued . . .)
control regulation. Two courts that did acknowledge these agency pronouncements have held that state law governs the question of a motor carrier's vicarious liability. *Penn v. Virginia Int'l Terminals, Inc.*, 819 F. Supp. 514, 523 (E.D. Va. 1993); *Parker v. Erixon*, 473 S.E.2d 421, 426 (N.C. Ct. App. 1996). Both *Penn* and *Parker* addressed the cases holding that I.C.C. regulations mandate an irrebuttable presumption of agency and held that those decisions misconstrue the regulation. *Penn*, 819 F. Supp. at 523; *Parker*, 473 S.E.2d at 426 (stating that "the I.C.C. regulations were not intended to impose upon carriers using leased equipment or the services of independent contractors

shipment exempt items such as pallets would not excuse a carrier from the duties placed upon it as a matter of federal leasing law. Whether federal leasing regulations can apply in the face of unambiguous jurisdictional exemptions in order to avail the public-protection aspects of the regulatory scheme writ-large is an important question that has not yet been resolved by this Court. The Court should grant this petition for a writ of certiorari so that it can answer the question.

Before the control regulation can apply in a case such as this, there must be agency jurisdiction over the transportation of the item at issue. *See generally* 49 U.S.C. § 13501.[17] In this case, used pallets were involved with Mr. Robertson's alleged injury. These used pallets, not loaded by Motor Cargo, the lessor Kifsco, or the lessor Kifsco's driver, fell when Mr. Robertson attempted to unload them. Neither Motor Cargo's trailer nor the lessor Kifsco's tractor caused the injury.

(continued . . .)
greater liability than that imposed when a carrier uses its own equipment or employees").

[17] This statute was formerly codified at 49 U.S.C. § 10521. Jurisdictional statutes for motor carrier transportation were located at 49 U.S.C. §§ 10501-10561 at the time Mr. Robertson was allegedly injured in 1993. In

49 U.S.C. § 13506(a)(11) specifically provides that "[n]either the Secretary nor the Board has jurisdiction under this part over . . . transportation of used pallets . . . ." This law was adopted as part of the Motor Vehicle Act of 1980, a legislative package designed to deregulate the trucking industry. Paul Stephen Dempsey, *Congressional Intent and Agency Discretion – Never the Twain Shall Meet: The Motor Carrier Act of 1980*, 58 Chi. Kent L. Rev. 1, 2-3 (1981). In an effort to create a competitive system with less governmental intrusion, Congress expanded the statutory list of motor carrier transportation exempt from the I.C.C.'s jurisdiction. H.R. Rep. No. 96-1069, at 18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2283, 2300; *Henslin v. Roaasti Trucking, Inc.*, 69 F.3d 995, 997 (9th Cir. 1995); Dempsey, *Congressional Intent and Agency Discretion* at 28.[18]

(continued . . .)
1995, the I.C.C. Termination Act moved the jurisdictional statutes to 49 U.S.C. §§ 13501-13541.

[18] Congress intended that the transportation exempted under Section 10526 (the predecessor to Section 13506) would be wholly outside the jurisdiction of the I.C.C. H.R. Rep. No. 96-1069, at 18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2283, 2300. The Act and the legislative history emphasize that the I.C.C. was to exercise its powers only within the confines of the specific authority conferred by the new law. *Id.*, 1980 U.S.C.C.A.N. at 2293;

Congress specifically created the used pallet exemption, 49 U.S.C. § 10526(a)(11), to confirm the I.C.C.'s prior determination that used pallets are merely instrumentalities of commerce, not regulated commodities. 1980 U.S.C.C.A.N. at 2302. Congress intended this exclusion to encourage efficiency in shipping by allowing greater flexibility in the use of shipping devices. *Id.* at 2301-02.

The language of 49 U.S.C. § 13506 is clear, unambiguous, and leaves nothing for interpretation by a court. *See I.C.C. v. Mr. B's Servs., Ltd.*, 934 F.2d 117, 120 (7th Cir. 1990). The statute dictates that transportation of used pallets is an activity falling outside of the I.C.C.'s jurisdiction and, consequently, beyond the I.C.C.'s leasing regulations. *See* 49 U.S.C. § 13506(a)(11). Mr. Robertson was injured by used pallets and, as a consequence, the clear language of 49 U.S.C. § 13506(a)(11) and the intent of

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(continued . . .)
Dempsey, *Congressional Intent and Agency Discretion* at 3-4, 29. This is unlike the prior exemption statute applied by *Vance Trucking Co. v. Canal Ins. Co.*, 249 F. Supp. 33, 38-39 (D. S.C. 1966), a case the Court of Appeals of Arizona improperly relied upon. *Cf.* 49 U.S.C. § 10526(a)(11) *with* former 49 U.S.C. § 304(f) (1935) (limiting the exemptions from regulation to the areas of duration and amount of compensation).

Congress dictates that the federal control regulation cannot govern this case.

The Court of Appeals of Arizona ignored this straightforward statutory analysis and complicated the issue by reasoning that a mixture of exempt and non-exempt goods overrides the plain language of the 49 U.S.C. § 10526(a)(11). The propriety of such a holding is resolved by resort to yet another clear and unambiguous statute that the lower court ignored.

49 U.S.C. § 13507[19] mandates that when exempt and regulated goods are carried together, the presence of the regulated goods does not affect the jurisdictional analysis with respect to the exempt goods. 49 U.S.C. § 13507 provides as follows:

> A motor carrier of property providing transportation exempt from jurisdiction under paragraph . . . (11) . . . of section 10526(a) may transport property under such paragraph in the same vehicle and at the same time as property which the carrier is authorized to transport under a certificate issued under section 10922(b) of this title or under a permit issued under section 1093 of

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[19] The statute in effect in 1993, at the time of Mr. Robertson's alleged injury, was 49 U.S.C. § 10528. 49 U.S.C. § 10528 was recodified as 49 U.S.C. § 13507 in 1995 without substantive modification as part of the I.C.C. Termination Act.

> this title. *Such transportation shall not affect the unregulated status of such exempt property.*

Id. (emphasis added). Pursuant to this statute the transport of used pallets falls outside federal agency jurisdiction and beyond agency regulation even when the pallets are mixed with other goods that are regulated.[20] As a consequence, federal leasing regulations cannot form the basis of vicarious liability for a motor carrier in the instant situation.

Applying the plain language faithfully is the only way to remain consistent with Congress's intent in adopting 49 U.S.C. § 10528 (recodified as 49 U.S.C. § 13507). That intent was to increase carriers' use of their equipment, thereby improving operating efficiency. *Henslin v. Roaasti Trucking, Inc.*, 815 F. Supp. 1347, 1350 (E.D. Cal. 1993) (citing H.R. Rep. No. 96-1069, at 34 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2283, 2316), *aff'd*, 69 F.3d 995 (1995); Dempsey, *Congressional Intent and Agency Discretion* at 28 n.117.

By requiring that exempt goods remain exempt from regulation, carriers' and customers' costs for the

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[20] It bears repeating that here, the pallets were shipped without authorization in a separate Motor Cargo trailer hitched onto a Motor Cargo trailer being used for a legitimate shipment of non-exempt goods.

transportation of goods are decreased. *Henslin*, 815 F. Supp. at 1350. In contrast, the reasoning of the Court of Appeals of Arizona contradicts Congress's intent to eliminate trucks dedicated exclusively either to inter- or intra-state commerce. If the lower court's reasoning were not rebuked, carriers would be influenced to resume the "inefficient operations and unnecessary consumption of fuel" that initially prompted the adoption of the exemption statute. *See* H.R. Rep. No. 96-1069 at 34 (explaining problems with prior regime). The court's error calls for correction.

CONCLUSION

For all of the foregoing reasons, Motor Cargo respectfully prays that this Court grant its petition for a writ of certiorari to the Court of Appeals of Arizona.

Respectfully submitted.

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MARCH 2001

APPENDIX

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

THOMAS ROBERTSON, an unmarried man, Plaintiff/Appellant, vs. MOTOR CARGO, INC., a Utah corporation, Defendant/Appellee.	1 CA-CV 97-0395 1 CA-CV 98-0186 (Consolidated) DEPARTMENT A O P I N I O N

Appeal from the Superior Court of Yavapai County
Cause No. CV 950436
The Honorable Robert M. Brutinel, Judge
REVERSED AND REMANDED

Jensen Law Firm, P.C.
by Christopher W. Jensen
Attorneys for Appellant
Prescott

Holloway, Odegard & Sweeney, P.C.
by Sally A. Odegard
Charles M. Callahan
Peter C. Kelly II
Attorneys for Appellee
Phoenix

G E R B E R, Judge

¶ 1 The question before us is whether a motor carrier that leased equipment and services from an independent trucking company incurs liability for injuries to a third party due to the negligence of the motor carrier's driver.

FACTS AND PROCEDURAL HISTORY

¶ 2 We view the facts in the light most favorable to appellant Thomas Robertson, against whom a summary judgment was entered. *State ex rel. Corbin v. Challenge, Inc.*, 151 Ariz. 20, 24, 725 P.2d 727, 731 (App. 1986). Appellee Motor Cargo, Inc. (Motor Cargo), a trucking company that transports freight, engages other companies, known as cartage companies, to transport freight from Motor Cargo to its consignors and consignees.

¶ 3 Under such a cartage agreement, Kifsco, Inc. (Kifsco) performed transport services for Motor Cargo in Coconino, Yavapai, and Navajo Counties. Kifsco used both tractors it owned and trailers owned by Motor Cargo to transport freight at Motor Cargo's request. Motor Cargo's Interstate Commerce Commission (ICC) placards affixed to both Kifsco's tractors and Motor Cargo's trailers identified the equipment as operating under Motor Cargo's ICC registration number.

¶ 4 Craig Wolsey, the sole shareholder of Kifsco, had formed Northern Arizona Pallets (NAP) to enable Kifsco's manager, Ron Wolsey, to supplement his income. NAP operated from Kifsco's terminal in Flagstaff, sharing a phone line and equipment with Kifsco. When Kifsco delivered freight for Motor Cargo to a consignee, the pallets carrying the freight became property of the consignee. NAP either purchased pallets from consignees for $1.00 each or received them free in exchange for hauling them away. Motor Cargo knew that NAP/Kifsco used Motor Cargo's trailers to ship pallets. NAP sent unbroken pallets back to Motor Cargo for shippers requesting their return.

¶ 5 In June 1993, Molly Shultz, a Kifsco driver preparing to leave its yard in Flagstaff to make a delivery to Ace Hardware in Prescott Valley for Motor Cargo, was asked by Polo Castro, an employee of NAP, to deliver 100 pallets to Western States Stone (Western States) in Ashfork. Shultz agreed to do so. Castro loaded the pallets onto Shultz's trailer along with the freight destined for Ace Hardware. Shultz did not inspect the trailer to make sure the pallets were loaded safely.

¶ 6 The pallets shifted during the drive and fell against the trailer doors. When Robertson, a Western States

employee, opened the doors, the pallets fell out and injured him.

¶ 7 Robertson sued Kifsco, Motor Cargo, Wolsey d/b/a NAP, Castro, and Shultz. In its motion for summary judgment, Motor Cargo denied any actual or implied agency relationship with Kifsco and argued it had never authorized Castro, Shultz, Wolsey, or NAP to act on its behalf to deliver pallets to Western States and also denied knowledge of that transaction.

¶ 8 Robertson replied that because Kifsco and Motor Cargo enjoyed an agency relationship under the cartage agreement and the negligence of Kifsco's employee caused Robertson's injury, Motor Cargo, as principal, was vicariously liable. He also argued that public policy supported a finding of actual agency because ICC trucking regulations held Motor Cargo liable for using its agent Kifsco to deliver freight under Motor Cargo's directions. Robertson also argues that Motor Cargo was estopped from denying an agency relationship because its own placards were affixed on the Kifsco tractor and trailer that delivered the pallets. He concluded that Kifsco had an implied agency relationship with Motor Cargo as to the pallet business because Motor Cargo allowed Kifsco/NAP to use its trailers to transport and deliver them.

¶ 9 The trial court granted Motor Cargo's motion for summary judgment and denied Robertson's cross-motion. It explained that Robertson had not presented facts sufficient to support alter ego, vicarious liability, or partnership theories against Motor Cargo. The liability of Kifsco was determined by default. The jury found Robertson's damages to be $315,138, with Kifsco 100% at fault. The trial court entered a judgment on the jury verdict and a second judgment in favor of Motor Cargo.

¶ 10 Robertson timely appealed from the trial judgment and from the denial of his cross-motion for summary judgment. He also filed a motion to set aside the summary judgment on the grounds of fraud and misconduct under Rule 60(c)(1), (3) and (6), Arizona Rules of Civil Procedure. This court suspended the appeal and revested jurisdiction in the trial court to consider the Rule 60(c) motion, which the trial court denied, prompting this appeal. Upon motion by Robertson, we consolidated the two appeals.

DISCUSSION

A. Issues

¶ 11 On appeal, Robertson raises two primary issues: First, did the trial court err in ruling that neither Arizona nor Interstate Commerce Commission (ICC) law makes

Motor Cargo vicariously liable for his injuries? Second, did the trial court err in concluding that the theory of apparent agency excused Motor Cargo from liability for Robertson's injuries? We need to address only the first of these issues.

B. Motor Cargo's Alleged Liability for Robertson's Injuries Under ICC Law

1. Did Robertson Raise This Issue Below?

¶ 12 Robertson now argues that under both Arizona and ICC law, a truck driver is irrebuttably presumed to be the employee of the motor carrier whose ICC placards he manifests. Therefore, Robertson contends, because Shultz was driving a Kifsco truck with Motor Cargo placards when Robertson was injured, she was an employee of Motor Cargo, which thereby becomes liable for her negligence.

¶ 13 Motor Cargo first replies that Robertson failed to raise this vicarious liability theory in the trial court and thus waived this argument on appeal. Our examination of the record reveals that Robertson did in fact raise the issue. His response to Motor Cargo's motion for summary judgment and his own cross-motion for partial summary judgment noted that the tractor and trailer driven by Shultz

bore placards displaying Motor Cargo's logo and ICC numbers and that the public policy underlying the ICC regulations would be served by preventing Motor Cargo from escaping liability. He cited two cases from the Ninth Circuit Court of Appeals in which the carrier-lessees were found to be the statutory employers of the negligent drivers under ICC regulations. His reply in support of his cross-motion for summary judgment reiterated his policy argument and noted that the United States Supreme Court had held motor carriers vicariously liable for damages caused by trucks showing their placards. He then argued:

> Even the Arizona Supreme Court has held that the presence of placards on the tractor/trailer is a basis of vicarious liability for the carrier named on the placard, based upon federal law and ICC regulations. *Transport Indem. Co. v. Carolina Cas. Inc.*, 133 Ariz. 395, 397, 652 P.2d 134, 136 (1982). *Transport Indemnity* cites *Brannaker v. Transamerican Freight Lines, Inc.*, 428 S.W.2d 524 (Mo. 1968), *Cox v. Bond Transportation, Inc.*, 249 A.2d 579 (1969), and *Mellon National Bank & Trust Co. v. Sophie Lines, Inc.*, 289 F.2d 473, 477 (3d Cir. 1961), "holding that federal law creates an *irrebuttable presumption* that the lessor's driver is the employer [sic - employee] of the vehicle [sic -lessee] whose placards identify the vehicle." (emphasis added). Therefore, despite Motor Cargo's protestations, Arizona law, by analogy,

> requires a finding of implied agency because of the *undisputed* evidence of Motor Cargo's placards on the negligently loaded trailer.

¶ 14 We conclude that these written arguments and citations sufficiently raised the ICC issue in the trial court.

2. Does ICC Law Place Liability for Robertson's Injuries on Motor Cargo?

¶ 15 We turn now to the question of vicarious liability. The Arizona Supreme Court in *Transport Indemnity Co. v. Carolina Casualty Insurance Co.*, 133 Ariz. 395, 652 P.2d 134 (1982), considered ICC regulations bearing on the tort liability of an ICC-licensed interstate carrier leasing a tractor, trailer, and driver from an independent trucker. The Interstate Commerce Act provides that the ICC may prescribe regulations "'reasonably necessary in order to insure that while motor vehicles are being . . . used [under lease] the motor carriers will have full direction and control of such vehicles and *will be fully responsible* for the operation thereof . . . *as if they were the owners* of such vehicles. . . .'" *Id.* at 397, 652 P.2d at 136 (quoting 49

U.S.C. § 304(e))[1] (emphasis added in *Transport Indemnity*). The court also noted that ICC regulations

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[1] This statute is now codified at 49 U.S.C. § 14102, which provides:

> **(a) General Authority of Secretary.** The Secretary may require a motor carrier providing transportation subject to jurisdiction under subchapter I of chapter 135 that uses motor vehicles not owned by it to transport property under an arrangement with another party to --
>
> (1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier;
>
> (2) carry a copy of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect;
>
> (3) inspect the motor vehicles and obtain liability and cargo insurance on them; and
>
> (4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary on safety of operations and equipment and with other applicable law as if the motor vehicles were owned by the motor carrier.

mandate that leases provide that the lessee have exclusive possession, control and use of the equipment and complete responsibility for it.

¶ 16 The intent of this law, said *Transport Indemnity*, is "to prevent the operation of unregulated, uninsured or underinsured vehicles on interstate trips by imposing responsibility for operation of trip-leased vehicles on the lessee holding the ICC certificate of convenience and necessity." Id. Congress in effect made the driver of the leased unit a statutory employee of the lessee: "federal law creates an irrebuttable presumption that the lessor's driver is the employee of the lessee whose placards identify the

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(continued . . .)

Leasing regulations adopted pursuant to this statute are found at 49 C.F.R. §§ 1057.11 and 1057.12. Section 1057.12(c)(1) reads:

> The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

vehicle." *Id. See also Zamalloa v. Hart*, 31 F.3d 911, 914 (9th Cir. 1994) (under ICC requirements, carrier becomes statutory employer of lessor's driver); *Wilson v. Riley Whittle, Inc.*, 145 Ariz. 317, 321, 701 P.2d 575, 579 (App. 1984) (federal law creates irrebuttable presumption that lessor is employee of the motor carrier).[2]

¶ 17 The cartage agreement provides that Kifsco is to protect and indemnify Motor Cargo against all loss that Motor Cargo might incur for injury to persons caused by negligent acts of Kifsco or its agents, servants, or employees. This type of indemnification agreement acknowledges Motor Cargo's responsibility for negligent acts of Kifsco and its employees.

¶ 18 Motor Cargo next argues that, notwithstanding the cited ICC law, it is not liable to Robertson under

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[2] The agreement between Motor Cargo and Kifsco conflicts superficially with this law by providing that persons employed by Kifsco to perform services under the agreement remain employees of Kifsco, which itself remains an independent contractor in the performance of the contract. However, the agreement also provides that any contractual provision that violates a statute, ordinance, or rule is "null, void, and of no effect." Therefore, given this language, the agreement does not supersede the ICC regulations.

respondeat superior because Shultz was acting outside the course and scope of her employment with Kifsco by transporting NAP pallets to Western States. We disagree for two reasons. First, the jury's finding that Kifsco was 100 percent liable for Robertson's injury and that Ron Wolsey was not at fault necessarily implies that Shultz was acting in the course and scope of her employment with Kifsco when she transported the pallets.

¶ 19 Second, we question the continued validity of the statement from *Wilson* that "[u]nder the Federal statutes and regulations the liability of the trucking company is no greater than that which exists under the doctrine of respondeat superior." 145 Ariz. at 321, 701 P.2d at 579. *Wilson* cited *Wilcox v. Transamerican Freight Lines*, 371 F.2d 403 (6th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967), as support for that statement. Several federal circuit courts, including the Ninth Circuit, have reached conclusions contrary to *Wilcox*.

¶ 20 *Planet Insurance Co. v. Transport Indemnity Co.*, 823 F.2d 285, 288 (9th Cir. 1987), decided that the federal regulatory schemes "do not require that covered losses occur while the driver is in the scope of employment or acting under common-law principles or vicarious liability." It concluded that state standards of *respondeat superior* did

not apply and that it was unnecessary to make findings about whether the driver was acting in the scope of employment with the lessee. Once the trip lease went into effect, said the court, the lessee and its insurer became responsible for any negligence of the lessor.

¶ 21 Similarly, *Rodriguez v. Ager*, 705 F.2d 1229, 1236 (10th Cir. 1983), held that even though the driver was not on a delivery for the carrier lessee when the accident occurred, the ICC licensed carrier became responsible as a matter of law for injuries sustained in the accident. In rejecting the holding in *Wilcox*, it noted *Wilcox* ignored ICC policies and governing authority.

¶ 22 The Fifth Circuit also follows the rule that ICC regulations "preempt state law in tort actions in which a member of the public is injured by the negligence of a motor carrier's employee while operating an interstate carrier vehicle." *Price v. Westmoreland*, 727 F.2d 494, 496 (5th Cir. 1984). *Price* held the ICC licensed carrier responsible for injuries suffered by an unauthorized passenger in the leased vehicle, noting that "'the ICC carrier's liability for equipment and drivers covered by leasing arrangements is not governed by the traditional common law doctrine of master-servant relationships and respondeat superior'" and thus the carrier became

vicariously liable as a matter of law for the negligence of the driver. *Id.* (quoting *Simmons v. King*, 478 F.2d 857, 867 (5th Cir. 1973)0; *see also Wellman v. Liberty Mut. Inc. Co.*, 496 F.2d 131, 136 (8th Cir. 1974) (unauthorized trip was subject to carrier's control and carrier was vicariously liable for injuries to third parties); *Mellon Nat'l Bank & Trust Co. v. Sophie Lines, Inc.*, 289 F.2d 473, 477 (3rd Cir. 1961) (carrier responsible for leased truck even when used for an unauthorized delivery for a third party).

¶ 23 These federal cases reflect the policy "requiring the lessee of a vehicle . . . to assure responsibility for the accidents of the driver of the vehicle which displays its insignia." *Rodriguez*, 705 F.2d at 1236. From these cases, we conclude that Motor Cargo is liable for the injuries suffered by Robertson and caused by Kifsco.[3]

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[3] Motor Cargo argues that an I[illegible] ruling, *Lease and Interchange of Vehicles (Identification Devices)*, 3 I.C.C.2d 92 (1986), has determined that state tort, contract, and agency law should apply to determine carrier liability. We note, however, that this ruling concerns liability of carriers when equipment owners continue to display the carrier's identification placard on equipment *after* termination of the lease. There is no dispute here that the agreement between Motor Cargo and Kifsco was in effect at the time Robertson was injured. Therefore, the ruling does not control here.

3. Does the Pallet Exemption Apply?

¶ 24 Motor Cargo next argues that ICC laws do not apply to impose liability on it because the ICC lacks jurisdiction over the transportation of used pallets. 49 United States Code ("U.S.C.") section 13506(a)(11) provides that "[n]either the Secretary nor the Board has jurisdiction under this part over transportation of used pallets and used empty shipping containers . . ."

¶ 25 Two federal cases address the effect of shipping an exempt commodity along with non-exempt items. In *Vance Trucking Co. v. Canal Insurance Co.*, 249 F. Supp. 33, 39 (D.S.C. 1966), *aff'd*, 395 F.2d 391 (4th Cir. 1968), *cert. denied*, 393 U.S. 845 (1968), the court rejected the contention that the lessee escaped ICC regulations because the negligent driver was hauling an exempt commodity. *Vance* held that regulations governing the use of leased vehicles applied without regard to the commodity being hauled because ICC regulations "are not designed to excuse a party from liability which he might otherwise have." Id.

¶ 26 Similarly, *Royal Indemnity Co. v. Jacobsen*, 863 F. Supp. 1537, 1542 (D. Utah 1994), dealing with an ICC endorsement in the motor carrier's insurance policy for a truck containing an exempt agricultural product, found liability regardless of the type of product being hauled.

Jacobsen noted that ICC regulations seek to protect the public and shippers from negligent carriers. It concluded that finding an exemption for hauling hay would undermine the intent of the Motor Carrier Act:

> Application of the endorsement should not depend on whether Jacobsen was hauling one particular type of product on the day of the accident instead of another. Such application would not advance the public policy goals of the Motor Carrier Act in protecting the general public, and it also would defy common sense.

Id.

¶ 27 We agree with *Vance Trucking* and *Jacobsen*. In making the ICC licensed carrier responsible for negligence of the agent, Congress sought to ensure that the public and shippers be protected in trucking accidents involving any covered products even if combined with exempt items. *See e.g., Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28, 37 (1975) (aim of rules is to fix financial responsibility for damages and injuries to shippers and public); *Zamalloa*, 31 F.3d at 913 (ICC laws enacted by Congress to protect public by preventing common carriers from evading liability for accidents caused by drivers); *Price*, 727 F.2d at 496 (to protect public from tortious conduct of judgment-proof operators of

interstate motor carrier vehicles, law requires motor carrier to assume full direction and control of leased vehicles). To allow Motor Cargo to escape liability merely because the lessor Kifsco added pallets along with regulated items defeats the policy goals of ICC regulations. We conclude that the transport of the pallets does not excuse Motor Cargo from liability under ICC law.

4. Was the Trip Solely in Intrastate Travel?

¶ 28 Motor Cargo next argues that the ICC regulations do not apply at all because the trip to Prescott Valley involved an intrastate rather than interstate shipment. 49 U.S.C. section 13501 concerning general jurisdiction provides:

> The Secretary and the Board have jurisdiction, as specified in this part, over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier--
>
> (1) between a place in--
>
> (A) a State and a place in another State;
>
> (B) a State and another place in the same State through another State;

> (C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;
>
> (D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or
>
> (E) the United States and a place in a foreign country to the extent the transportation is in the United States; and
>
> (2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

¶ 29 The ICC threshold is interstate shipment. The power of the ICC "to exercise jurisdiction over a carrier's employees is limited to 'activities [which] directly affect the safety of operation * * * in interstate * * * commerce.'" *Baird v. Wagoner Transp. Co.*, 425 F.2d 407, 412-13 (6th Cir. 1979) (citation omitted). Similarly, the ICC's rate and rule-making authority over motor carriers extends solely to interstate transportation. *In re Grand Jury Subpoena Duces Tecum Issued to Southern Motor Carriers Rate Conf., Inc.*

Dated August 13, 1975, 405 F. Supp. 1192, 1195 (N.D. Ga. 1975). The coverage afforded specifically by an ICC endorsement does not apply to purely intrastate transport. *Branson v. MGA Ins. Co., Inc.*, 673 So.2d 89, 92 (Fla. App. 1996).

¶ 30 A carrier engages in interstate commerce affecting Arizona when it transports goods that originate from beyond Arizona or are destined beyond Arizona. *See Merchants Fast Motor Lines, Inc. v. Interstate Commerce Comm'n*, 528 F.2d 1042, 1044 (5th Cir. 1976). Interstate travel occurs even if the route of a particular carrier in the overall interstate trip is wholly within one state. *Id.*

¶ 31 Accordingly, Motor Cargo and Kifsco engaged in interstate commerce if the Ace Hardware products carried by Kifsco for Motor Cargo originated in a state other than Arizona. Under 49 U.S.C. section 13501, we look to the transport origin to determine whether ICC jurisdiction applies. If the cargo hauled by Kifsco to Ace had been first transported in a state other than Arizona, Motor Cargo/Kifsco then would have engaged in interstate commerce during the trip to Ashfork/Prescott Valley.

¶ 32 Robertson speculates that the cargo bound for Ace Hardware originated in New Mexico, a possibility repeated in oral argument. The record is silent about this possibility.

However, given the fact that the products designed for Ace Hardware, a national chain, could not reasonably have been manufactured in their entirety exclusively in northern Arizona where the trip originated, we take judicial notice that at least some of the products shipped to Ace had to originate in states outside Arizona. In *Daniel v. Paul*, 395 U.S. 298, 305 (1969), the Supreme court sanctioned a similar exercise of judicial notice:

> The District Court took judicial notice of the fact that the "principal ingredients going into the bread were produced and processed in other States" and that "certain ingredients [of the soft drinks] were probably obtained . . . from out-of-State sources." 263 F. Supp., at 418. Thus, at the very least, three of the four food items sold at the snack bar contain ingredients originating outside of the State. There can be no serious doubt that a "substantial portion of the food" served at the snack bar has moved in interstate commerce.

¶ 33 Based on this judicial notice, we conclude that the shipment to Ace Hardware involved at least some products originating in other states. The shipment thus falls under ICC regulations affecting interstate commerce. In the event that counsel possess clear evidence to the contrary, this issue may be re-litigated in the trial court. In the absence

of such evidence, we conclude that ICC interstate regulations govern.

CONCLUSION

¶ 34 We reverse the trial court's grant of summary judgment in favor of Motor Cargo and remand for entry of summary judgment holding Motor Cargo liable for Robertson's injuries caused by Kifsco.

/s/_____
Rudolph J. Gerber, Presiding Judge
Department A

CONCURRING:

/s/_____
Noel Fidel, Judge

/s/_____
Sarah D. Grant, Judge

FILED
DEC 18 2000

SUPREME COURT OF ARIZONA

THOMAS ROBERTSON, an unmarried man, Plaintiff/Appellant, vs. MOTOR CARGO, INC., a Utah corporation, Defendant/Appellee.	Arizona Supreme Court CV-00-0057-PR Court of Appeals Division One Nos. 1 CA-CV 97-0395 and 1 CA-CV 98-0186 (Consolidated) Yavapai County Superior Court No. CV950436

ORDER

After hearing oral argument and considering further the pleadings filed, it appears to the Court that the grant of review in this case was improvident, Therefore,

IT IS ORDERED that the order granting review is vacated.

IT IS FURTHER ORDERED that the Petition for Review is dismissed.

IT IS FURTHER ORDERED that the Court of Appeals Opinion shall be depublished, pursuant to Rule 111(g), Arizona Rules of the Supreme Court.

DATED this 18th day of December, 2000.

/s/
CHARLES E. JONES
Vice Chief Justice

49 U.S.C. § 14102. Leased motor vehicles

(a) General Authority of Secretary.–The Secretary may require a motor carrier providing transportation subject to jurisdiction under subchapter I of chapter 135 that uses motor vehicles not owned by it to transport property under an arrangement with another party to–

(1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier;

(2) carry a copy of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect;

(3) inspect the motor vehicles and obtain liability and cargo insurance on them; and

(4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier.

(b) Responsible Party for Loading and Unloading.–The Secretary shall require, by regulation, that any arrangement, between a motor carrier of property providing transportation subject to jurisdiction under subchapter I of chapter 135 and any other person, under which such other

person is to provide any portion of such transportation by a motor vehicle not owned by the carrier shall specify, in writing, who is responsible for loading and unloading the property onto and from the motor vehicle.

49 C.F.R. § 376.12. Written lease requirements

Except as provided in the exemptions set forth in subpart C of this part, the written lease required under Sec. 376.11(a) shall contain the following provisions. The required lease provisions shall be adhered to and performed by the authorized carrier.

(a) Parties. The lease shall be made between the authorized carrier and the owner of the equipment. The lease shall be signed by these parties or by their authorized representatives.

(b) Duration to be specific. The lease shall specify the time and date or the circumstances on which the lease begins and ends. These times or circumstances shall coincide with the times for the giving of receipts required by Sec. 376.11(b).

(c) Exclusive possession and responsibilities.

(1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

(2) Provision may be made in the lease for considering the authorized carrier lessee as the owner of the

equipment for the purpose of subleasing it under these regulations to other authorized carriers during the lease.

(3) When an authorized carrier of household goods leases equipment for the transportation of household goods, as defined by the Secretary, the parties may provide in the lease that the provisions required by paragraph (c)(1) of this section apply only during the time the equipment is operated by or for the authorized carrier lessee.

(4) Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements.

(d) Compensation to be specified. The amount to be paid by the authorized carrier for equipment and driver's services shall be clearly stated on the face of the lease or in an addendum which is attached to the lease. Such lease or addendum shall be delivered to the lessor prior to the commencement of any trip in the service of the authorized carrier. An authorized representative of the lessor may accept these documents. The amount to be paid may be expressed as a percentage of gross revenue, a flat rate per

mile, a variable rate depending on the direction traveled or the type of commodity transported, or by any other method of compensation mutually agreed upon by the parties to the lease. The compensation stated on the lease or in the attached addendum may apply to equipment and driver's services either separately or as a combined amount.

(e) Items specified in lease. The lease shall clearly specify which party is responsible for removing identification devices from the equipment upon the termination of the lease and when and how these devices, other than those painted directly on the equipment, will be returned to the carrier. The lease shall clearly specify the manner in which a receipt will be given to the authorized carrier by the equipment owner when the latter retakes possession of the equipment upon termination of the lease agreement, if a receipt is required at all by the lease. The lease shall clearly specify the responsibility of each party with respect to the cost of fuel, fuel taxes, empty mileage, permits of all types, tolls, ferries, detention and accessorial services, base plates and licenses, and any unused portions of such items. The lease shall clearly specify who is responsible for loading and unloading the property onto and from the motor vehicle, and the compensation, if any, to be paid for this service. Except when the violation results from

the acts or omissions of the lessor, the authorized carrier lessee shall assume the risks and costs of fines for overweight and oversize trailers when the trailers are pre-loaded, sealed, or the load is containerized, or when the trailer or lading is otherwise outside of the lessor's control, and for improperly permitted overdimension and overweight loads and shall reimburse the lessor for any fines paid by the lessor. If the authorized carrier is authorized to receive a refund or a credit for base plates purchased by the lessor from, and issued in the name of, the authorized carrier, or if the base plates are authorized to be sold by the authorized carrier to another lessor the authorized carrier shall refund to the initial lessor on whose behalf the base plate was first obtained a prorated share of the amount received.

(f) Payment period. The lease shall specify that payment to the lessor shall be made within 15 days after submission of the necessary delivery documents and other paperwork concerning a trip in the service of the authorized carrier. The paperwork required before the lessor can receive payment is limited to log books required by the Department of Transportation and those documents necessary for the authorized carrier to secure payment from the shipper. In addition, the lease may provide that, upon

termination of the lease agreement, as a condition precedent to payment, the lessor shall remove all identification devices of the authorized carrier and, except in the case of identification painted directly on equipment, return them to the carrier. If the identification device has been lost or stolen, a letter certifying its removal will satisfy this requirement. Until this requirement is complied with, the carrier may withhold final payment. The authorized carrier may require the submission of additional documents by the lessor but not as a prerequisite to payment. Payment to the lessor shall not be made contingent upon submission of a bill of lading to which no exceptions have been taken. The authorized carrier shall not set time limits for the submission by the lessor of required delivery documents and other paperwork.

(g) Copies of freight bill or other form of freight documentation. When a lessor's revenue is based on a percentage of the gross revenue for a shipment, the lease must specify that the authorized carrier will give the lessor, before or at the time of settlement, a copy of the rated freight bill or a computer-generated document containing the same information, or, in the case of contract carriers, any other form of documentation actually used for a shipment containing the same information that would

appear on a rated freight bill. When a computer- generated document is provided, the lease will permit lessor to view, during normal business hours, a copy of any actual document underlying the computer-generated document. Regardless of the method of compensation, the lease must permit lessor to examine copies of the carrier's tariff or, in the case of contract carriers, other documents from which rates and charges are computed, provided that where rates and charges are computed from a contract of a contract carrier, only those portions of the contract containing the same information that would appear on a rated freight bill need be disclosed. The authorized carrier may delete the names of shippers and consignees shown on the freight bill or other form of documentation.

(h) Charge-back items. The lease shall clearly specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation at the time of payment or settlement, together with a recitation as to how the amount of each item is to be computed. The lessor shall be afforded copies of those documents which are necessary to determine the validity of the charge.

(i) Products, equipment, or services from authorized carrier. The lease shall specify that the lessor is not

required to purchase or rent any products, equipment, or services from the authorized carrier as a condition of entering into the lease arrangement. The lease shall specify the terms of any agreement in which the lessor is a party to an equipment purchase or rental contract which gives the authorized carrier the right to make deductions from the lessor's compensation for purchase or rental payments.

(j) Insurance.

(1) The lease shall clearly specify the legal obligation of the authorized carrier to maintain insurance coverage for the protection of the public pursuant to FHWA regulations under 49 U.S.C. 13906. The lease shall further specify who is responsible for providing any other insurance coverage for the operation of the leased equipment, such as bobtail insurance. If the authorized carrier will make a charge back to the lessor for any of this insurance, the lease shall specify the amount which will be charged-back to the lessor.

(2) If the lessor purchases any insurance coverage for the operation of the leased equipment from or through the authorized carrier, the lease shall specify that the authorized carrier will provide the lessor with a copy of each policy upon the request of the lessor. Also, where the lessor purchases such insurance in this manner, the lease

shall specify that the authorized carrier will provide the lessor with a certificate of insurance for each such policy. Each certificate of insurance shall include the name of the insurer, the policy number, the effective dates of the policy, the amounts and types of coverage, the cost to the lessor for each type of coverage, and the deductible amount for each type of coverage for which the lessor may be liable.

(3) The lease shall clearly specify the conditions under which deductions for cargo or property damage may be made from the lessor's settlements. The lease shall further specify that the authorized carrier must provide the lessor with a written explanation and itemization of any deductions for cargo or property damage made from any compensation of money owed to the lessor. The written explanation and itemization must be delivered to the lessor before any deductions are made.

(k) Escrow funds. If escrow funds are required, the lease shall specify:

(1) The amount of any escrow fund or performance bond required to be paid by the lessor to the authorized carrier or to a third party.

(2) The specific items to which the escrow fund can be applied.

(3) That while the escrow fund is under the control of the authorized carrier, the authorized carrier shall provide an accounting to the lessor of any transactions involving such fund. The carrier shall perform this accounting in one of the following ways:

(i) By clearly indicating in individual settlement sheets the amount and description of any deduction or addition made to the escrow fund; or

(ii) By providing a separate accounting to the lessor of any transactions involving the escrow fund. This separate accounting shall be done on a monthly basis.

(4) The right of the lessor to demand to have an accounting for transactions involving the escrow fund at any time.

(5) That while the escrow fund is under the control of the carrier, the carrier shall pay interest on the escrow fund on at least a quarterly basis. For purposes of calculating the balance of the escrow fund on which interest must be paid, the carrier may deduct a sum equal to the average advance made to the individual lessor during the period of time for which interest is paid. The interest rate shall be established on the date the interest period begins and shall be at least equal to the average yield or equivalent coupon issue yield on 91-day, 13-week Treasury

bills as established in the weekly auction by the Department of Treasury.

(6) The conditions the lessor must fulfill in order to have the escrow fund returned. At the time of the return of the escrow fund, the authorized carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease, and shall provide a final accounting to the lessor of all such final deductions made to the escrow fund. The lease shall further specify that in no event shall the escrow fund be returned later than 45 days from the date of termination.

(l) Copies of the lease. An original and two copies of each lease shall be signed by the parties. The authorized carrier shall keep the original and shall place a copy of the lease on the equipment during the period of the lease unless a statement as provided for in Sec. 376.11(c)(2) is carried on the equipment instead. The owner of the equipment shall keep the other copy of the lease.

(m) This paragraph applies to owners who are not agents but whose equipment is used by an agent of an authorized carrier in providing transportation on behalf of that authorized carrier. In this situation, the authorized carrier is obligated to ensure that these owners receive all the rights and benefits due an owner under the leasing

regulations, especially those set forth in paragraphs (d)-(k) of this section. This is true regardless of whether the lease for the equipment is directly between the authorized carrier and its agent rather than directly between the authorized carrier and each of these owners. The lease between an authorized carrier and its agent shall specify this obligation.

49 U.S.C. § 13506. Miscellaneous motor carrier transportation exemptions

(a) In General. - Neither the Secretary nor the Board has jurisdiction under this part over –

(1) a motor vehicle transporting only school children and teachers to or from school;

(2) a motor vehicle providing taxicab service and having a capacity of not more than 6 passengers and not operated on a regular route or between specified places;

(3) a motor vehicle owned or operated by or for a hotel and only transporting hotel patrons between the hotel and the local station of a carrier;

(4) a motor vehicle controlled and operated by a farmer and transporting –

(A) the farmer's agricultural or horticultural commodities and products; or

(B) supplies to the farm of the farmer;

(5) a motor vehicle controlled and operated by a cooperative association (as defined by section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a))) or by a federation of cooperative associations if the federation has no greater power or purposes than a cooperative association, except that if the cooperative association or federation provides transportation for compensation

between a place in a State and a place in another State, or between a place in a State and another place in the same State through another State –

(A) for a nonmember that is not a farmer, cooperative association, federation, or the United States Government, the transportation (except for transportation otherwise exempt under this subchapter) - (i) shall be limited to transportation incidental to the primary transportation operation of the cooperative association or federation and necessary for its effective performance; and (ii) may not exceed in each fiscal year 25 percent of the total transportation of the cooperative association or federation between those places, measured by tonnage; and

(B) the transportation for all nonmembers may not exceed in each fiscal year, measured by tonnage, the total transportation between those places for the cooperative association or federation and its members during that fiscal year;

(6) transportation by motor vehicle of –

(A) ordinary livestock;

(B) agricultural or horticultural commodities (other than manufactured products thereof);

(C) commodities listed as exempt in the Commodity List incorporated in ruling numbered 107, March 19, 1958,

Bureau of Motor Carriers, Interstate Commerce Commission, other than frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, or wool imported from a foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted);

(D) cooked or uncooked fish, whether breaded or not, or frozen or fresh shellfish, or byproducts thereof not intended for human consumption, other than fish or shellfish that have been treated for preserving, such as canned, smoked, pickled, spiced, corned, or kippered products; and

(E) livestock and poultry feed and agricultural seeds and plants, if such products (excluding products otherwise exempt under this paragraph) are transported to a site of agricultural production or to a business enterprise engaged in the sale to agricultural producers of goods used in agricultural production;

(7) a motor vehicle used only to distribute newspapers;

(8)(A) transportation of passengers by motor vehicle incidental to transportation by aircraft;

(B) transportation of property (including baggage) by motor vehicle as part of a continuous movement which, prior or subsequent to such part of the continuous

movement, has been or will be transported by an air carrier or (to the extent so agreed by the United States and approved by the Secretary) by a foreign air carrier; or

(C) transportation of property by motor vehicle in lieu of transportation by aircraft because of adverse weather conditions or mechanical failure of the aircraft or other causes due to circumstances beyond the control of the carrier or shipper;

(9) the operation of a motor vehicle in a national park or national monument;

(10) a motor vehicle carrying not more than 15 individuals in a single, daily roundtrip to commute to and from work;

(11) transportation of used pallets and used empty shipping containers (including intermodal cargo containers), and other used shipping devices (other than containers or devices used in the transportation of motor vehicles or parts of motor vehicles);

(12) transportation of natural, crushed, vesicular rock to be used for decorative purposes;

(13) transportation of wood chips;

(14) brokers for motor carriers of passengers, except as provided in section 13904(d); or

(15) transportation of broken, crushed, or powdered glass.

(b) Exempt Unless Otherwise Necessary. - Except to the extent the Secretary or Board, as applicable, finds it necessary to exercise jurisdiction to carry out the transportation policy of section 13101, neither the Secretary nor the Board has jurisdiction under this part over –

(1) transportation provided entirely in a municipality, in contiguous municipalities, or in a zone that is adjacent to, and commercially a part of, the municipality or municipalities, except –

(A) when the transportation is under common control, management, or arrangement for a continuous carriage or shipment to or from a place outside the municipality, municipalities, or zone; or

(B) that in transporting passengers over a route between a place in a State and a place in another State, or between a place in a State and another place in the same State through another State, the transportation is exempt from jurisdiction under this part only if the motor carrier operating the motor vehicle also is lawfully providing intrastate transportation of passengers over the entire route under the laws of each State through which the route runs;

(2) transportation by motor vehicle provided casually, occasionally, or reciprocally but not as a regular occupation or business, except when a broker or other person sells or offers for sale passenger transportation provided by a person authorized to transport passengers by motor vehicle under an application pending, or registration issued, under this part; or

(3) the emergency towing of an accidentally wrecked or disabled motor vehicle.

49 U.S.C. § 13507. Mixed loads of regulated and unregulated property

A motor carrier of property providing transportation exempt from jurisdiction under paragraph (6), (8), (11), (12), or (13) of section 13506(a) may transport property under such paragraph in the same vehicle and at the same time as property which the carrier is authorized to transport under a registration issued under section 13902(a). Such transportation shall not affect the unregulated status of such exempt property or the regulated status of the property which the carrier is authorized to transport under such registration.

IN THE SUPERIOR COURT OF THE STATE
OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

HONORABLE ROBERT M. BRUTINEL,
JUDGE PRESIDING

CV 95-0436

THOMAS ROBERTSON, AN UNMARRIED MAN, PLAINTIFF

v.

POLO CASTRO AND RON WOOLSEY, DBA
NORTHERN
ARIZONA PALLETS, ET UX, ET AL., DEFENDANTS

TRANSCRIPT OF PROCEEDINGS

PRESCOTT, ARIZONA

AUGUST 26, 1996

Appearances:

For the Plaintiff:

THOMAS ROBERTSON
By: Christopher Jensen
Jensen Law Firm
711 Whipple Street
Prescott, AZ 86301-1717

and

POLO CASTRO AND RON WOOLSEY, DBA
NORTHERN ARIZONA PALLETS, ET UX, ET AL.
By: Sally A. Odegard
Holloway Odegard & Sweeney, P.C.
3101 N. Central Avenue
Suite 1200
Phoenix, Arizona 85012

Prescott, Arizona; Wednesday
August 26, 1996

MR. JENSEN: No, I think you've heard it.

THE COURT: All right.

Last, but not least, I have got Kifsco's – or defendants' cross motion for summary judgment regarding Kifsco's liability.

Have we adequately covered that?

MS. ODEGARD: I believe so, unless Your Honor would like to hear anything else.

THE COURT: No. Although it's an interesting issue.

MR. JENSEN: By the way, I guess there is one thing I wanted to mention, and that is, the Court's aware – I have cited it – there is an Arizona Supreme Court case referencing a federal interstate trucker and federal regulations but which is very analogous to this situation, that say, clearly, for reasons of public policy, that when a truck is wearing a placard of an interstate carrier, there is going to be liability under implied agency regardless of other circumstances, because –

THE COURT: For what kind of injury?

MR. JENSEN: For a negligent tort injury like here.

That's what happened in this case.

THE COURT: Damage to an individual unloading a truck?

MR. JENSEN: That case was a vehicle accident, intersection accident.

THE COURT: Okay.

MR. JENSEN: However, it was a negligent truck driver and similar type situation where they said, "Wait a second, we didn't authorize this truck driver to have drinks that night," and et cetera. And the Arizona Supreme Court said that's too bad, because public policy requires that the trucking industry, being regulated strongly for the protection of the public, and we can't allow truckers to use these shadow corporations and all that to avoid liability. We need – you need to regulate the trucking industry so that the public is protected against claims like this, because it I faith in the trucking industry and public needs that they have these federal regulations, and that the reason Arizona had –

THE COURT: Is that the same as we had here? Was there a company who owned the truck that was working under a cartage agreement?

MR. JENSEN: I can't answer that.

THE COURT: I will read the case.

MR. JENSEN: And, of course, there is a body of other federal cases that say the same thing, if you got the placards you got liability.

But I admit that has to do with interstate rather intrastate.

THE COURT: The agency, in and of itself, doesn't create any liability on Motor Cargo's part. The fact that I could find some sort of respondeat superior liability as a result of agency would –

MR. JENSEN: Our position is that negligence and liability is established as to several of these people already by admissions. So that's not an issue here.

The issue is the relationships, agency and other vicarious liability type relationships.

THE COURT: All right.

Want the last word?

MS ODEGARD: I don't know that it's necessary, Your Honor.

THE COURT: All right.

I am going to take them all under advisement.

MR. JENSEN: And were we going to talk about a trial date next month?

THE COURT: I can't do that right now. I am already running twenty minutes late and I apologize.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF YAVAPAI

THOMAS ROBERTSON, an unmarried man, Plaintiff, v. POLO CASTRO and RON WOOLSEY, dba NORTHERN ARIZONA PALLETS, and JANE DOE CASTRO and JANE DOE WOOLSEY, their wives; KIFSCO, INC., an Arizona Corporation; MOTOR CARGO, INC., a Utah Corporation; JANE DOE I, and unidentified truck driver employed by another defendant; DOES II-X; and ZYX CORPORATION, Defendants.	Cause No. CV 95-0436 PLAINTIFF'S REPLY TO MOTOR CARGO'S OBJECTIONS TO PLAINTIFF'S FORMS OF JUDGMENT AND STATEMENT OF COSTS, RULE 68 SANCTIONS, AND NOTICE OF TAXATION

Plaintiff Thomas Robertson, through undersigned counsel, hereby replies to Defendant Motor Cargo, Inc.'s ("MC") Objections to Forms of Judgment and Statement of Costs, Rule 68 Sanctions, and Notice of Taxation.

Robertson respectfully requests that this Court follow the Mandate of the Court of Appeals which directs this Court to grant him "summary judgment holding MC liable for Robertson's injuries caused by Kifsco," and that MC's Objections be denied as improper attempts to frustrate and avoid the Court of Appeals' Mandate.

The Superior Court must comply with the appellate court's Mandate. The Mandate orders this court to comply with the Court of Appeals' memorandum decision. *See* Mandate dated January 3, 2001. That decision holds, *inter alia,* that:

> We reverse the trial court's grant of summary judgment in favor of Motor Cargo and *remand for entry of summary judgment holding Motor Cargo liable for Robertson's injuries caused by Kifsco.* ¶ 34.

(Emphasis added.) The superior court has the duty to comply with the mandate. and the mandate may not be questioned or avoided. *Vargas v. Superior Court,* 60 Ariz. 395, 397 (1943). On remand, the superior court must strictly follow the appellate court mandate. *In re Marriage of Molloy,* 181 Ariz. 146, 149 (App. 1994*), recon. denied, and rev. denied.* The Mandate here is unambiguous and specific. This court is not free to deviate from an appellate court's mandate giving specific directions. *Johnson v. Mofford,* 193 Ariz. 540 (App. 1998), *rev. denied* (appellate

court decision is law of the case that binds all courts of same or lower level in subsequent proceedings in same case). The trial court lacks jurisdiction to deviate from the mandate of the appellate court.

[* * *]

The Superior Court has no jurisdiction to hear MC's objections. All of the issues MC raises as objections to this court's compliance with the Mandate have either already been raised in the courts above or could have been raised there. As such, they are deemed to have been determined against Motor Cargo pursuant to *Ferguson.* This court is without jurisdiction to modify or question the valid mandate issued it by the Court of Appeals after full review, including oral argument, amicus briefing. etc. *See Pacific Greyhound.* Motor Cargo is engaged in a desperate attempt to avoid the Mandate. But, as was found by the Court of Appeals, and as was upheld by the Supreme Court, judgment should have been entered in 1996 in favor of Robertson and holding MC liable for Robertson's injuries caused by Kifsco. This court does not have jurisdiction to challenge or to refuse the entry of judgment as required by the Mandate of the Court of Appeals, which states, *inter alia:*

[we] remand for entry of summary judgment holding Motor Cargo liable for Robertson's injuries caused by Kifsco.

[* * *]

DATED this 1st day of February, 2001.

JENSEN LAW FIRM, P.C.

By /s/_____
Christopher Jensen
Hans Clugston
Attorneys for Plaintiff

LEASE AND INTERCHANGE OF VEHICLES (IDENTIFICATION DEVICES)

(49 CFR Part 1057)

EX PARTE No. MC-43 (Sub-No. 16)

INTERSTATE COMMERCE COMMISSION

3 I.C.C. 2d 92; 1986 MCC LEXIS 150

October 10, 1986

SYLLABUS:

The Commission adopts final rules governing the removal and/or return of carrier identification devices on termination of a lease agreement. The rules authorize negotiation between the parties, and permit carriers to withhold final payment to equipment owners pending the removal and/or return of identification devices.

PANEL:

DECISION

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre, and Lamboley.

OPINION:

BACKGROUND

On December 12, 1984 (49 Fed. Reg. 48576, December 13, 1984), in response to a petition filed by the Interstate Carriers Conference (Conference), we instituted this rulemaking (NPR) to consider amending our rules to resolve problems involving carrier liability for the tortious acts of equipment owners who wrongfully continue to display the carrier's identification devices on equipment after a lease contract has terminated.[1] We concluded that the rules proposed by the Conference would not accomplish the desired results, but we proposed other rules instead.[2]

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[1] The Conference proposed a rule to make it the responsibility of an equipment-owner lessor, upon termination of a lease contract, to remove the carrier's identification devices from its equipment. However, since owner-operators are not under this Commission's jurisdiction, we found that we could not impose on them this requirement. Further, we found that modifying a second rule to provide expressly that a carrier is liable for the operation of equipment by the owner-lessor only so long as the lease contract, by its own terms, remains in effect would not necessarily influence a court applying State law. Accordingly, we declined to propose this modification.

[2] Several comments seek clarification that the proposed rules extend not only to removable identification devices such as decals and those made out of plastic, cardboard, or metal, but also to more permanent carrier identification painted directly on equipment. Some comments estimate that more than one-half of equipment owners paint the

First, we proposed adding a sentence to 49 CFR 1057.12(f) stating that the lease agreement may provide that, upon termination of the lease, the lessor must return all identification devices of the authorized carrier as a condition precedent to payment. Second, we proposed adding a sentence to 49 CFR 1057.11(c)(1) specifying that the parties to a lease agreement may provide in the lease that the equipment owner, rather than the carrier, will be responsible for the removal and return of the identification devices.

Comments from 25 groups or individuals representing carriers, owner-operators, and shippers were filed. Nearly all support the proposed rules. However, some argue that they do not provide the relief needed. One comment representing owner-operator interests reflects concern about out proposal to allow carriers to withhold payment.

DISCUSSION AND CONCLUSIONS

As noted by the comments, certain courts have relied on Commission regulations in holding carriers liable for the acts of equipment owners who continue to display the carrier's identification on equipment after termination of the

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carrier's colors or logo on their equipment. The rules extend to all identification devices whether by decal, painting, or other method.

lease contract. We prefer that courts decide suits of this nature by applying the ordinary principles of State tort, contract, and agency law. The Commission did not intend that its leasing regulations would supersede otherwise applicable principles of State tort, contract, and agency law and create carrier liability where none would otherwise exist. Our regulations should have no bearing on this subject. Application of State law will produce appropriate results.

Our final rules are designed to make clear that our leasing rules do not and are not intended either to assign liability based on the existence of placards or to interfere with otherwise applicable State law. That is why we continue to decline to adopt the second rule originally proposed by the Conference. Specifically, we will not revise 49 CFR 1057.12(c)(1) to state that a carrier is liable for the operation of the equipment by the owner-lessor only so long as the lease contract, by its own terms, remains in effect. To do so could be interpreted as an attempt to influence State law. Liability in these situations depends on a variety of factual and legal determinations outside the scope of Commission jurisdiction. Nevertheless, we repeat that our rules are not intended to influence in any fashion a court's liability determination.

However, we agree with those comments that suggest that our proposed rule revisions do not go far enough in assisting carriers properly to limit their liability. Additional revisions are necessary. The rules we adopt here represent such an effort by offering carriers the means of ensuring that placards are removed when the lease expires. Each is discussed below.

Negotiation of return rule. The Conference characterizes this rule as partially remedial in nature. It believes that the rule will induce many, but not all, equipment lessors to voluntarily remove and return identification devices if the lease contract so requires. The Conference argues, contrary to our statement in the NPR, that, because we can enforce 49 U.S.C. Subtitle IV and our regulations, we can regulate owner-operator operations if owner-operators continue to display forms of carrier identification after termination of a lease and then transport property for-hire in interstate commerce without authority. The American Trucking Associations, Inc. (ATA) argues that contractual terms requiring the lessor to remove and return the identification devices and give receipts are not enough to ensure compliance with those terms.

Removal and return of identification devices should be a matter to be decided by contract between the carrier and

equipment owner. The rule we are adopting will give the carriers flexibility to require immediate return of identification devices. We continue to decline to adopt the Conference's first proposed rule that would place an affirmative duty on owner-operators to remove and return identification devices after termination of the lease. We cannot do so because owner-operators are not subject to our jurisdiction. The jurisdiction we have is narrow in scope, and it exists through our enforcement powers. We can prevent unauthorized persons from operating illegally and we can impose sanctions. Only indirect influence is exerted on owner-operators via our leasing rules, through the jurisdiction we have over the carriers to whom they lease.

Withholding payment. The Conference welcomes this proposal as a clarification, but states that it will have no real remedial effect. ATA argues that a carrier's ability to withhold final payment will deter only some owner-operators.

Four States Owner Operator Truckers Association (Four States) argues that adoption of this rule permitting carriers to withhold payment pending return of their identification devices will erode the protection against unscrupulous carrier-lessees presently afforded owner-

operators under the payment provisions of 49 CFR 1057.12(f). Four States fears some carriers will use the new rule as a means unjustly to deny compensation to owner-operators long-term. It argues that carriers should only be allowed to withhold final payment in an amount not to exceed $100. Additionally, Four States states that most identification. devices are made of cardboard and are attached to the leased equipment by tape. Consequently, some blow away due to adverse weather conditions or they are stolen. It argues that denying compensation to equipment owners in these situations would be unfair.

Schneider National Carriers, Inc. (Schneider) states that there are times when the lessee may want the lessor to retain the identification, without returning it, because of an ongoing relationship between the parties. It maintains that mandating return of identification in this situation is unwarranted.

We will adopt 49 CFR 1057.12(f) as proposed, with one modification. As an incentive to those owner-operators that are required by the lease contract to remove and return identification devices on termination of the lease, we will permit carriers to condition final payment to them on their compliance with this obligation. If, as Four States argues, carriers use this as an improper means of withholding

payment from owner-operators, the Commission can intervene. We are also sympathetic to those concerns expressed by Four States regarding identification devices either stolen or lost. Accordingly, we will permit an owner-lessor to send a sworn statement to a lessee that the identification has been removed, but cannot be returned because it was lost or stolen. Schneider's concern -- an ongoing relationship between the lessor and lessee -- can be addressed in the lease. Rule 1057.12(f) is permissive. The parties certainly may agree that the lessor will retain the identification devices.

Responsibility to remove identification and obtain receipt. The Conference requests that we amend 49 CFR 1057.11(c)(1) by deleting the following language:

Upon termination of the lease, the authorized carrier shall remove all identification showing it as the operating carrier before giving up possession of the equipment.

In addition, the Conference proposes deletion of 49 CFR 1057.11(b)(2) that presently requires the carrier to get a receipt from the lessor when the carrier gives up possession of the equipment. Schneider makes similar proposals.

The Conference argues that these deletions will leave such matters to be resolved in the lease contract. Under

this alternative, the regulations would be silent as to the obligation and responsibility for the removal of identification devices. Absent specific regulations on the subject, the Conference suggests that State and federal courts would apply the doctrine of respondeat superior with reference to the contract's provisions regarding responsibility for identification removal.

ATA also suggests that we eliminate two requirements, one at 49 CFR 1057.11(b)(2) (requiring carriers to obtain a receipt from the lessor when possession of the equipment ends), and the other at 49 CFR 1057.11(c)(1) (imposing an affirmative duty on carriers to remove their identification devices). As a result of the changes, ATA argues, the critical issue - whether carriers should be liable for accidents involving equipment displaying their devices after termination of a lease - would remain a factual one to be decided under the State's law of agency and not under the Commission's rules.

We will adopt the ATA's proposals as they are integrally related to the issues raised in the NPR.[3] In fact, the requirements ATA proposes to delete contradict the proposed rules. First, we will delete the requirement at 49

CFR 1057.11(c)(1) that requires a carrier to retrieve its own identification devices before giving up possession of the equipment. This requirement is impractical and very often impossible for carriers to fulfill in light of present day leasing practices. It also is inconsistent with the concept of these rules that the parties should themselves resolve these matters in the lease. Next, we will amend 49 CFR 1057.12(e) regarding items that must be specified in the lease contract by requiring that the parties specify who has the responsibility to remove and return identification devices. These revisions will make unnecessary the revision of 49 CFR 1057.11(c)(1) which was proposed in the NPR.

We will also revise the rule at 49 CFR 1057.11(b)(2) that requires the carrier to obtain a receipt from the owner when its possession of the equipment ends. As with current rule 1057.11(c)(1), this rule places an unrealistic burden on most carriers and offers no flexibility to the lease parties. We will delete it, and substitute in its place a rule that states that, when possession of the equipment by the carrier ends, a receipt will be given in accordance with the terms of the lease agreement. In addition, we will add language to 49

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[3] Accordingly, we do not believe additional notice and comment is necessary.

CFR 1057.12(e) that requires the lease agreement to address this matter.

Finally, as an alternative to its other proposals, the Conference requests that we amend 49 CFR 1057.11(c)(1) by adding the following language:

The obligation of the authorized carrier to obtain the receipt called for by 49 CFR 1057.11(b)(2) and to secure removal of all identification showing it as the operating carrier shall be considered discharged by a good faith effort to achieve such removal; such good faith effort shall be satisfied by proof that a demand for return of removable devices or removal by other means of permanent forms of identification has been made by the authorized carrier by certified mail to the independent contractor lessor's last known address.

Since we have decided to adopt rules granting the primary relief sought by the Conference and ATA, we will not and need not adopt their less-favored alternate.

Other issues. Dart Transit Company believes placarding requirements should be eliminated altogether, arguing that license plates already adequately identify the party involved in the accident. This request is beyond the scope of this proceeding, but Dart may submit a separate petition for such a rule change.

Another carrier, Blair Cartage, Inc., favors legislation that would make the voluntary, post-lease withholding of the carrier's identification devices an illegal act punishable at law. This issue is beyond the scope of this proceeding, and this Commission. Should the litigation problems that led to our action here continue, we will consider the need to support remedial legislation.

ENVIRONMENTAL AND ENERGY CONSIDERATIONS

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

REGULATORY FLEXIBILITY ANALYSIS

We reaffirm our prior certification. The rules we are adopting will not have a significant economic impact on a substantial number of small entities. While the rules we adopt will affect a substantial number of small entities, i.e., independent owner-operators, their economic impact will not be substantial. Equipment owners required by the lease contract to remove, package, and return identification devices to the carriers may incur some additional expense, but, as stated in our earlier decision, such additional costs can ultimately be the subject of negotiations between the

equipment owner and the carrier entering into a lease contract. This same analysis holds true with respect to those owner-operators required by the lease to provide the carrier with a receipt when they retake possession of the equipment. Finally, the other rule revisions that we adopt here are not of a nature to have any direct economic impact at all.

It is ordered:

1. We adopt the rules set forth in the appendix to this decision.

2. Notice will be published in the Federal Register on October 22, 1986.

3. This decision is effective on November 21, 1986.

Index: The subject involved in 49 CFR Part 1057 is:

Motor carriers

APPENDIX: APPENDIX

Part 1057 of the Code of Federal Regulations, Title 49, is amended as follows:

PART 1057 - LEASE AND INTERCHANGE OF VEHICLES

1. The authority citation following § 1057.12 is removed and the authority citation for 49 CFR Part 1057 is revised to read as follows:

Authority: 49 U.S.C. 11107 and 10321; 5 U.S.C. 553.

2. Section 1057.11(b)(2) is revised to read as follows:

§1057.11 General leasing requirements.

* * *

(b) * * *

(2) When possession of the equipment by the authorized carrier ends, a receipt shall be given in accordance with [*14] the terms of the lease agreement if the lease agreement requires a receipt.

§1057.11 - [Amended]

3. The second sentence of 49 CFR 1057.11(c)(1) is removed.

§1057.12 - [Amended]

4. Two sentences are added to 49 CFR 1057.12(e) at the beginning of the section to follow the heading as follows:

"The lease shall clearly specify which party is responsible for removing identification devices from the equipment upon the termination of the lease and when and how these devices, other than those painted directly on the equipment, will be returned to the carrier. The lease shall clearly specify the manner in which a receipt will be given to the authorized carrier by the equipment owner when the latter retakes possession of the equipment upon termination of the lease agreement, if a receipt is required at all by the lease."

5. Three sentences are added to 49 CFR 1057.12(f) between the existing second and third sentences as follows:-

"In addition, the lease may provide that, upon termination of the lease agreement, as a condition precedent to payment, the lessor shall remove all identification devices of the authorized carrier and, except in the case of identification painted directly [*15] on the equipment, return them to the carrier. If the identification device has been lost or stolen, a letter certifying its removal will satisfy this requirement. Until this requirement is complied with, the carrier may withhold final payment."

PETITION TO AMEND 49 CFR 1057
LEASE AND INTERCHANGE OF VEHICLES

Decided: January 13, 1992
1992 W.L. 6625 (Slip Copy)

INTERSTATE COMMERCE COMMISSION DECISION
MOTOR CARRIER
Ex Parte No. MC-203

By the Commission, Chairman Philbin, Vice Chairman Emmett, Commissioners Simmons, Phillips, and McDonald.

The Interstate Truckload Carriers Conference and the American Trucking Associations, Inc., seek institution of a proceeding to amend the Commission's regulations dealing with written lease requirements at 49 CFR 1057.12(c), Exclusive possession and responsibilities, to insert a new Paragraph (4), which would read:

> (4) Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect the agency relationship between the lessor or driver provided by the lessor and the authorized carrier lessee. An independent contractor or employment relationship may exist when a carrier lessee complies with 49 U.S.C- Section 11107 and attendant administrative requirements.

The purpose of the proposed amendment is to give notice to

the courts and the states worker's compensation and other administrative tribunals that it is not the intention of the Commission's regulations to affect the agency relationship between a motor carrier lessee and the independent owner-operator lessor by requiring in 49 CFR Part 1057.12(c)(1) that the lease provide for the lessee's "exclusive possession, control, and use" of the equipment provided by the lessor.

Petitioners contend that the "exclusive possession, control, and use" phrase should not be a factor in determining whether a lessor is an independent contractor or an employee for agency determination purposes. They further contend that the Commission's control regulation is neutral and is to be given no weight in any agency relationship determination. Petitioners argue that courts and State administrative agencies, particularly workers' compensation agencies, have misapplied the Commission's motor vehicle lease and interchange regulations. They maintain that the current language of the regulation causes unintended results with respect to agency status issues.

Petitioners point out that most courts have correctly interpreted the appropriate scope of the control regulation and held that the type of control required by the regulation does not affect "employment" status. However, petitioners

also contend that some courts and State worker's, compensation and unemployment agencies have misused the Commission's control regulation and held the language to be prima facie evidence of existence of an employer-employee relationship. Petitioners contend that these State agencies often argue that the Commission's control regulation evidences the type of control that is indicative of an employee- employer relationship. Petitioners argue that the suggested amendment would place the Commission's own view of the effect of the control regulation squarely before a court or agency asked to interpret the regulation's impact and, thereby would eliminate the need for that tribunal to undertake a lengthy legal analysis of the control regulation--an analysis that unfortunately could lead the court or agency to the wrong conclusion. Petitioners further argue that by presenting its own interpretation, the Commission would for all practical purposes bring a halt to erroneous assertions about the effect and intent of the control regulation, saving both the fact-finder and the carrier time and expense. Finally, petitioners argue that the purpose of this amendment is to ensure that no party will erroneously rely on the lease language mandated by the control regulation as evidence of an employee- employer relationship. A number of motor carriers have submitted letters urging the Commission to initiate the rulemaking

proceeding. A list of those carriers is set forth in the appendix.

DISCUSSION AND CONCLUSIONS

The Commission's regulations are silent on the agency status of lessors, and its decisions are clear that the Commission has taken no position on the issue of independence of lessors. See, e.g., Lease and Interchange of Vehicles (Ident. Devices), 3 I.C.C. 92, 93 (1986). Petitioners correctly point out that most courts have interpreted the appropriate scope of the control regulation and held that the type of control required by the regulation does not affect employment status, although there is some difference of opinion among the courts on this point. We have, therefore, decided to institute a rulemaking proceeding on this issue and seek public comments about the advisability of changing our rules as proposed.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A notice of proposed rulemaking will be instituted in this proceeding.

2. This decision is effective on January 21, 1992.

Sidney L. Strickland, Jr.
Secretary
(SEAL)

APPENDIX

List of carriers submitting supporting letters.

1. Deboer, Inc.
2. Glass Trucking Co., Inc.
3. Priority Freight Systems, Inc.
4. Kuhn Transportation Company, Inc.
5. National Carriers
6. Champion Distribution Services
7. Triangle Equipment Corp.
8. Guy Heavener, Inc.
9. Tri-State Transportation Corp.
10. Britton Transport, Inc.
11. Jefferson Transport Service
12. Penn Empire Transport, Inc.
13. BJ Transport Inc.
14. Earl L. Henderson Trucking Co.
15. Economy Transport Inc.
16. C.A. White Trucking Company
17. Cargo-Master, Inc..

18. Robert Hansen Trucking Inc.

19. Tran-Star, Inc.

20. Dirksen Transportation

I.C.C.

1992 WL 6625 (I.C.C.)

PETITION TO AMEND LEASE AND INTERCHANGE OF VEHICLE REGULATIONS

Ex Parte No. MC-203

INTERSTATE COMMERCE COMMISSION

8 I.C.C. 2d 669; 1992 MCC LEXIS 91

SERVICE DATE: July 23, 1992

June 29, 1992

SYLLABUS:

In this decision, we are amending the regulations at 49 C.F.R. § 1057.12(c) Exclusive possession and responsibilities, by adding a new paragraph.

PANEL:

Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons, Phillips, and Emmett.

OPINION BY: By the Commission

OPINION:

By notice published at 57 Fed. Reg. 2512 (1992) we proposed to amend our General Rules and Regulations dealing with written lease requirements at 49 CFR 1057.12(c), Exclusive possession and responsibilities. The rulemaking was requested by the American Trucking Associations, Inc. (ATA) and the Interstate Truckload

Carriers Conference (ITCC) (collectively, petitioners) who sought an amendment which would insert a new paragraph (4), which would read:

> (4) Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. § 11107 and attendant administrative requirements.

The suggested language was modified in some respects in the published notice of proposed rulemaking, most notably by inserting in the first sentence a reference to an "agency relationship" between the lessor or driver provided by the lessor and the authorized carrier lessee. Also, the words "or employment" were inserted in the second sentence.[1]

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[1] The proposed rule was published as follows:

> (4) Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect the agency relationship between the lessor or driver provided by the lessor and the authorized carrier lessee. An independent contractor or employment relationship may exist when a carrier lessee complies with 49 U.S.C. 11107 and attendant administrative requirements.

As stated by petitioners, their proposed amendment is designed to give notice to the courts and worker's compensation or other administrative tribunals that our "control regulation" in 49 C.F.R. Part 1057.12(c)(1), requiring that the lease provide for the lessee's "exclusive possession, control, and use" of the equipment provided by the lessor, is not intended to affect the relationship between a motor carrier lessee and the independent owner-operator lessor. Petitioners contend that the "exclusive possession, control, and use" phrase should not be a factor in determining whether a lessor is an independent contractor or an employee and that this control regulation is neutral and should be given no weight in any agency relationship determination. Petitioners argue that courts and State administrative agencies, particularly worker's compensation agencies, have misapplied the Commission's motor vehicle lease and interchange regulations. They thus maintain that the current language of the regulation causes unintended results with respect to agency status issues.

ATA is a national trade association which represents over 30,000 motor carriers. ITCC represents over 600 motor carriers. Petitioners filed comments in support of the proposed amendment. To ensure that the regulation is completely neutral, they request that the first sentence of the amended regulation follow their original request.

Petitioners argue that the proposed reference to an "agency relationship" between the lessor owner-operator and the lessee motor carrier be eliminated because it is unnecessary, and could create confusion. Petitioners appear to accept inserting "or employment" in the second sentence of the proposed rule.

We also have received comments from a number of other associations, motor carriers, law firms, and individuals. With one exception, all the comments support some form of the amendment. Most of the comments support petitioners' version of the proposed amendment. They agree that the existing regulation causes unintended results.

Some of the comments discuss the proposed rule in the original version proposed by petitioners without any discussion of the "agency relationship" issue or the insertion of "or employment." Others clearly support petitioners' views on the "agency relationship" issue. One comment, that of Mr. Karl L. Gotting, is directed in its entirety against the insertion of "or employment" in the second sentence. He believes that this change negates the effect of including the paragraph in the regulations, is confusing, and does not result in any improvement in the existing situation.

DISCUSSION AND CONCLUSIONS

The Commission's regulations are silent on the agency status of lessors, and our decisions are clear that the Commission has taken no position on the issue of independence of lessors. See, e.g., Lease and Interchange of Vehicles (Ident. Devices), 3 I.C.C.2d 92, 93 (1986). However, we are convinced by the comments that the proposed amendment will serve a useful purpose and should be adopted. In light of the comments we will amend our regulations by adding the paragraph in the form originally proposed by petitioners, which we find better suited than the published version to accomplish the stated objectives.

While most courts have correctly interpreted the appropriate scope of the control regulation and have held that the type of control required by the regulation does not affect "employment" status, it has been shown here that some courts and State workers' compensation and employment agencies have relied on our current control regulation and have held the language to be prima facie evidence of an employer-employee relationship. These State agencies often find that the current regulation evidences the type of control that is indicative of an employer-employee relationship.

We conclude that adopting the proposed amendment will reinforce our view of the neutral effect of the control regulation and place our stated view squarely before any court or agency asked to interpret the regulation's impact. The proposed amendment should eliminate the need for such tribunals to undertake any lengthy legal analysis of the control regulation and lessen the likelihood that they will reach the wrong conclusions. By presenting a clear statement of the neutrality of the regulation, we hope to bring a halt to erroneous assertions about the effect and intent of the control regulation, saving both the factfinders and the carriers time and expense.

ENVIRONMENTAL AND ENERGY CONSIDERATIONS

We adopt our preliminary findings in the notice of proposed rulemaking that amending the regulations as proposed will not significantly affect either the quality of the human environment or the conservation of energy resources.

REGULATORY FLEXIBILITY ANALYSIS

We ratify our preliminary conclusion that our action in adopting the amendment will not have a significant

economic impact upon a substantial number of small entities. Adding the paragraph will not impose any burden.

INDEX

The index terms for 49 C.F.R. Part 1057 are as follows: Motor carriers; reporting and recordkeeping requirements.

Authority: 49 U.S.C. 11107 and 10321; 5 U.S.C. 553.

It is ordered:

1. The regulations at 49 CFR Part 1057 are amended as set forth in the appendix.

2. Notice will be published in the ICC Register and the Federal Register on July 24, 1992.

3. This decision is effective on August 23, 1992.

APPENDIX: APPENDIX

Title 49, chapter X, part 1057 of the Code of Federal Regulations is amended as follows:

PART 1057-LEASE AND INTERCHANGE OF VEHICLES

1. The authority citation for part 1057 continues to read as follows:

Authority: 49 U.S.C. 11107 and 10321; 5 U.S.C. 553.

2. In § 1057.12 a new paragraph (c)(4) is added to read as follows:

§ 1057.12 Written lease requirements.

* * *

(c) * * *

(4) Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 11107 and attendant administrative requirements.

* * *

PETITION TO AMEND LEASE AND INTERCHANGE OF VEHICLES REGULATIONS--HOUSEHOLD GOODS CARRIERS REENTITLED LEASE AND INTERCHANGE OF VEHICLES REGULATIONS--DECLARATORY ORDER

Decided: March 8, 1994
1994 WL 70557

Service Date: March 10, 1994

INTERSTATE COMMERCE COMMISSION DECISION
Ex Parte No. MC-43 (Sub-No. 20)

By the Commission, Chairman McDonald, Vice Chairman Phillips, Commissioners Simmons, and Philbin. Commissioner Walden participated in the voting conference and in an earlier phase of the notation voting in this case. He did not vote on the decision served today.

By proposed rulemaking decision served November 9, 1992, and notice published in the Federal Register (57 FR 53463) and ICC Register on November 10, 1992, (collectively, the NPR) we proposed to amend the written lease requirements at 49 CFR 1057.12(c), Exclusive possession and responsibilities, in response to a petition filed by the American Movers Conference (AMC). The NPR indicated that we might resolve the matter through

issuance of a declaratory order interpreting the existing regulations and requested comments on that alternative. We conclude that the amendments are not warranted, but we will issue a declaratory order to remove uncertainty concerning the purpose and application of the regulations in their present form.

THE PROPOSED AMENDMENTS

AMC's petition and comments explain that the courts are misconstruing the Interstate Commerce Act (Act) and Commission regulations to create causes of action against carriers that could not be brought under state law. AMC believes that its proposed amendments will advise the courts that the Act and our regulations, specifically 49 U.S.C. 11107 and 49 CFR Part 1057, were not intended to create new causes of action under state law and also will clarify the nature of the responsibilities of authorized interstate household goods carriers (also referred to as "van lines") under intermittent leases.

The first proposed change would add two sentences to existing paragraph (3) of 49 CFR 1057.12(c), which would then read:

(3) When an authorized carrier of household

> goods leases equipment for the transportation of household goods, as defined by the Commission, the parties may provide in the lease that the provisions required by paragraph (c) (1)[1] of this section apply only during the time the equipment is operated by or for the authorized carrier lessee. Such carrier lessee shall neither have possession, control, or use, nor be responsible for the operation of the equipment when it is not operated by or for such carrier lessee, or operated outside its operating authority. Removal of the authorized carrier's identification devices shall not be required when the equipment is not being operated by or for such carrier lessee. [Footnote added, new language underlined.]

AMC also sought to modify 49 CFR 1057.12(c) by adding a new paragraph (5),[2] which as slightly modified for

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[1] Paragraph 1057.12(c)(1) provides:

> (c) Exclusive possession and responsibilities--(1)
> The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

[2] AMC's suggested paragraph addition was numbered (5)

publication to conform to the Code of Federal Regulations' style requirements, reads as follows:

> (5) Nothing in the provisions required by paragraph (c)(1) of this section is intended to impose liability on an authorized carrier lessee in connection with operations under the lease with lessors or owners as referred to in paragraph (m) of this section (hereinafter lessors) for injuries or property damage sustained by lessors, persons under contract with lessors or employees of lessors.[3]

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due to the Ex Parte No. MC-203 rulemaking, which involved the addition of paragraph (4) to 49 CFR 1057(12)(c). Final rules adopting that proposed revision were approved in Lease and Interchange of Vehicle Regulations, 8 I.C.C. 2d 669 (1992). The final rules were published July 24, 1992, 57 FR 32905 and effective August 23, 1992. The new paragraph (4) was included in the current revision of Title 49 of the Code of Federal Regulations, as of October 1, 1992.

[3] 49 CFR 1057.12(m) provides:

> (a) This paragraph applies to owners who are not agents but whose equipment is used by an agent of an authorized carrier in providing transportation on behalf of that authorized carrier. In this situation, the authorized carrier is obligated to ensure that these owners receive all the rights and benefits due an owner under the leasing regulations, especially those set forth in paragraphs (d)-(k) of this section. This is

COMMENTS

Comments were filed by a number of household goods carriers, other motor carriers, associations, and individuals, all identified in the appendix. Several Members of Congress filed comments, requests for time extensions, or otherwise made inquiries about this proceeding.

Comments of the household goods carriers. AMC is a national trade association representing the household goods moving industry.[4] AMC notes that paragraph (c) (3) of section 1057.12 allows household goods carriers to limit their exclusive possession, control, use, and responsibility for equipment to times when they actually operate the equipment. Under so-called "intermittent" leases, household goods carriers may surrender leased equipment

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> true regardless of whether the lease for the equipment is directly between the authorized carrier and its agent rather than directly between the authorized carrier and each of these owners. The lease between an authorized carrier and its agent shall specify this obligation.

[4] We have given preliminary approval to a proposal to merge AMC into the Household Goods Carriers' Bureau, Inc. Section 5a Application No. 1 (Agreement No. 9), Household Goods Carriers' Bureau. Inc.--Agreement (not printed), served July 7, 1993.

to their agents and independent contractors.[5]

AMC requested the amendments because it asserts that some trial courts have misconstrued the Commission's intent in establishing the exception to the general leasing requirements in paragraph (c)(3). These courts have found that van lines have a legal responsibility for torts committed with equipment covered by intermittent leases, even when they are not operating the equipment. Additionally AMC indicates that because leased vehicles displayed the placard or identity of the van lines at the time of the accidents,[6] courts have refused, or have been

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[5] This allows the lessors to use equipment, while eliminating any need to enter now leases each time equipment is taken out of or returned to service for the van lines. This special treatment for the household goods industry and its regulatory history are discussed fully in AMC's initial pleading. In summary, the basis for the special treatment centers on unique operational circumstances in household goods transportation which involves utilizing specialized equipment provided by the licensed carriers' agents, who in turn are local and intrastate carriers themselves. See the discussion and original formulation of the rule in Lease and Interchange of Vehicles by Motor Carriers, 51 M.C.C. 461, 500-04 (1950), 52 M.C.C. 675, 708-13, 724, 744-45 (1951).

[6] 49 CFR 1057.11(c) provides in part:

reluctant, to dismiss cases against them. AMC contends that some courts have imposed liability on the van lines under 49 CFR 1057.11(c)(1), relying on the presence of placards required by Commission regulation.

AMC argues that unnecessary costs are being imposed unfairly on the van lines. It concedes the absence of reported decisions interpreting 49 CFR 1057.12(c)(3). AMC attributes this paucity of decisions to van lines (1) avoiding potential exposure by using indemnity contracts with their lessors, (2) reluctantly settling claims for economic reasons, or (3) only recently initiating efforts before the courts to interpret the leasing regulations properly.

AMC contends that the amendments are needed because courts use the Commission's leasing regulations to impose

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> (c) identification of equipment--The authorized carrier acquiring the use of equipment under this section shall identify the equipment as being in its service as follows: (1) During the period of the lease, the carrier shall identify the equipment in accordance with the Commission's requirements in part 1058 of this chapter (Identification of Vehicles).

liability for injuries suffered by persons in leased vehicles beyond the limits imposed by workers' compensation statutes. *See e.g., Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 89 (4th Cir. 1974); *contra, White v. Excalibur Insurance Co.*, 599 F.2d 50 (5th Cir. 1979), *cert. denied*, 444 U.S. 965 (1979). AMC believes that the liability imposed by the courts in these situations is unfair because the carrier lessees would not be liable otherwise for such injuries under state law. Under these circumstances, AMC argues that Commission guidance to help correct the problem is necessary. AMC's position is that the proposed amendments do not change the substance of the leasing regulations, but only clarify their intent.

The van lines support the proposed amendments. They believe that individual carriers should not be held liable for injuries sustained by the public, their drivers, or helpers unless they occur while equipment is being operated by or on behalf of the carrier. The van lines support the purposes of the amendments: to give notice to courts that the leasing regulations do not give persons additional causes of action that do not exist under state law, and to clarify the responsibilities of both parties to intermittent leases.

Some commenting carriers discuss problems involving

employees (drivers or helpers) who are injured on the job, recover from workman's compensation, and collect additional damages. They focus, in particular, on an Ohio case holding a van line liable in tort when an equipment lessor's helper was killed in an accident.[7] The helper's widow collected under the Ohio workers' compensation statute because her deceased husband was employed by a driver under lease to a van line agent in Ohio. The agent's contract with the van line made the agent responsible for having worker's compensation coverage in leasing situations. Nevertheless, the Ohio appeals court upheld the trial court's imposition of tort liability on the van,line based upon the commission's leasing regulations. Consequently, the widow received compensation both from the workers' compensation insurance provided by the agent and from a tort judgment against the van line.

AMC argues that state courts are interpreting the Commission's placarding regulations in paragraph (c) of section 1057.11 to impose strict liability upon interstate carriers. According to AMC, the courts reach this result by

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[7] *Stonerock v. Miller Bros. Paying*, 72 Ohio App. 3d 123, 594 K.E. 2d 94; *motion overruled*, 60 Ohio St.3rd 712, 573 N.E.2d 672, *reh'g denied*, 61 Ohio St.3d 1414; 574 N.E.2d 1077 (1991).

holding that household goods carriers entering into an intermittent lease under paragraph (c)(3) of section 1057.12 must remove placards from equipment when it is not being operated in their service because paragraph (c) of section 1057.11 states that placards must be in place "during the period of the lease." The apparent contradiction results from the fact that an intermittent lease does not terminate when equipment is not in the household goods carrier's service; the lease is merely "suspended" when the equipment is not being operated by the carrier and not in the carrier's possession and control. Most of the comments supporting AMC indicate that the placarding regulations are a primary reason that state courts hold van lines responsible for torts committed with equipment not in their service.

Comments of nonhousehold goods carriers. While agreeing with AMC that the leasing regulations need clarification, the joint comments of the American Trucking Associations, Inc. (ATA) and the Interstate Truckload Carriers Conference (ITCC), proposes changes beyond the scope of the NPR. ATA and ITCC argue that the problems for the interstate motor carrier industry of state courts imposing additional liability based on incorrect construction of Commission leasing regulations are not limited to the

household goods segment of the industry. ATA and ITCC believe that revision of paragraph 1057.12(c)(3) should be expanded to extend the scope of the clarification to include authorized carrier lessees operating under master lease agreements, not just household goods carriers' lessees operating under intermittent leases. Additionally, they argue that the proposed clarification of the effect of the placarding regulations should be expressly expanded to cover all types of carrier lessees, arguing that regulation should not be a source of tort liability for any segment of the industry. ATA and ITCC suggest specific amendments to paragraph (c)(1) of section 1057.11 and paragraph (c)(3) of section 1057.12 and the addition of new paragraphs (c)(5) and (c)(6) of section 1057.12.

The joint comments of Dart Transit Company (Dart) and Fleetline, Inc. (Fleetline), while supporting AMC's position, also proposes to expand the scope of the amendments beyond the scope of the NPR. Dart and Fleetline suggest a broadening of new paragraph (c)(5) of section 1057.12 to cover all motor carrier leases, not just household carriers' intermittent leases. They argue that a carrier's liability under the lease should not be extended to periods when the equipment is not being operated in furtherance of the carrier's business or when the required

"bobtail" insurance covers liability incurred when the lessor is not acting in the business of the lessee-carrier.[8] They discuss conflicts that have arisen concerning whether the lessor, lessor's employees, or persons under contract to the lessor, and authorized passengers, are persons within the concept of the "public" to be protected by the leasing regulations. They argue that such persons should not be part of the public deemed to be so protected. ATA and ITCC offer amendments to clarify that public liability is to be determined by statute or common law and not by the leasing regulations. The separate comment of Mainstream Trucking, Inc., supports the Dart-Fleetline alternative.

Opposition comments. The comments filed in opposition to the NPR come from individuals and organizations interested in public safety. The Institute for Injury Reduction believes that the proposed amendments would hinder persons injured by defective equipment or unsafe drivers in their attempt to determine who is responsible for their injuries, and to seek reasonable compensation.

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[8] "Bobtail" insurance is an industry term for insurance covering nontrucking or noncommercial use. This coverage is effective when the insured equipment is not operated in furtherance of a trucking business under any authority or dispatch (e.g., an owner-operator going out of service or returning home).

Additionally, it believes that the amendments would allow interstate carriers involved in "intermittent lease" agreements to disclaim responsibility for injuries caused by leased equipment while continuing to benefit from placarding and promotional advertising on equipment that is not being operated in the service of such carriers when the accidents occur.

Ms. Donna Michaud-Berger's comments in opposition arise out of a tragic accident that occurred in Florida during a family vacation. The family's parked car was struck by a vehicle placarded with the North American Van Lines (NAVL) name. It appears that the vehicle was operated under an intermittent lease with NAVL's agent or independent contractor and had been surrendered back to the lessor at the time of the accident. Her husband and three children were killed, and she sustained severe emotional and physical injuries. She believes that NAVL should be held liable for the accident because the placard identifies it as the "owner" of the vehicle. It is alleged that the driver of the vehicle was impaired and the vehicle was in an unsafe condition at the time of the accident. Her primary objection to the proposed amendments is her belief that the safety of the traveling public is in danger when carriers are allowed to "improperly" identify equipment. Ms. Berger argues that

NAVL, as well as the lessor, should be legally responsible for the accident involving her family because they both assertedly were aware that the driver was in violation of Federal and Florida safety rules for the operation of motor equipment. Additionally, she contends that injured people should not have the burden of determining who is responsible for their injuries under these circumstances.

Salwa H. Hanna, M.D., filed comments against the proposed amendments because of an accident involving her car and a household goods tractor-trailer. She states that the accident robbed her of her ability and license to practice medicine. She believes that the amendment would encourage "hit-and-run" conduct. According to Dr. Hanna, the drivers know that vehicle identification means nothing absent proof that the operation was "within" the operating authority of some entity. Based on the conduct of the driver responsible for her injury, Dr. Hanna believes that if the proposed amendments had been in effect at the time of her accident the driver might not have stopped. Dr. Hanna argues that each tractor-tailor is a moving billboard for the lessee regardless of the destination of the shipment. Additionally, she contends that control is material, and the proposed amendments would remove liability for "outside" operations without recognizing that (1) the lessee remains

in substantial control, and uses that control, and (2) the control is necessary to address basic safety concerns.

Citizens for Reliable and Safe Highways (CRASH) is also opposed to the proposed amendments. CRASH argues that implementing the proposal would threaten the safety of the traveling public and remove liability from household goods carriers, who have a duty to operate and maintain their vehicles in a safe manner.

The Owner-Operator Independent Drivers Assn., Inc. (OOIDA) maintains that the Commission is without authority to make changes because the proposed amendments are too vague and imprecise to be implemented. OOIDA speculates that the amendments would have an adverse impact on small business and believe that a business impact study is necessary. Also, OOIDA asserts that a large number of van lines will go without proper insurance coverage. OOIDA argues that Commission regulations covering licensed motor carriers require that there be a "fail safe" mechanism for third parties to recover against motor carriers for bodily or property injury. In OOIDA's view, statutes and cases are correct in holding household goods carriers strictly liable

for all injuries to third parties.[9]

DISCUSSION AND CONCLUSIONS

The Commission's regulations at 49 CFR Part 1057--Lease and Interchange of Vehicles, and 49 CFR Part 1058--Identification of Vehicles, address among other things the difficulty in fixing a carrier-lessee's responsibility for accidents. See American Trucking Associations, Inc. v. United States, 344 U.S. 298, 305 (1953). The Commission included a provision which generally assigned to the lessee exclusive possession, control, and use of the equipment while the lease was in effect, but making special provision for the intermittent leases of household goods carriers in the predecessor to section 1057.12(c) in Lease and Interchange of Vehicles by Motor Carriers, 52 M.C.C. 675, 744-45 (1951). As noted, an intermittent lease does not terminate when the equipment leaves the carrier's service; the lease is merely "suspended" while the equipment is

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[9] Several household goods carriers replied to the comments of OOIDA. They point out that existing Commission regulations do not impose "strict liability" on household goods for injuries resulting from accidents involving intermittently leased vehicles. They also dispute OOIDA's contention that a gap of liability insurance would result from adoption of the amendment. Moreover, one carrier believes that OOIDA desires to maintain confusion about

used in the agent's service. The Commission has recognized that responsibility for all operations is the agent's when the equipment is used in the agent's service. 49 CFR 1057.12(3).

In light of the comments, it is now apparent that modifying the rules as proposed by AMC would merely lead to further requests to modify the rules, as the ATA-ITCC and Dart-Fleetline comments demonstrate. All of the matters of concern to the commenters involve issues that the Commission is not directly involved with. Although we appreciate that the motor carrier industry is confronted with problems because of court actions involving our rules, the proposals have attracted comments from others who are concerned with the impact on their rights resulting from changes in the rules. We will not change the rules and will discontinue the rulemaking aspect of this proceeding.

In the NPR, we stated that we would consider whether the issuance of a declaratory order in lieu of a rule change would be appropriate. Under 49 U.S.C. 10321, we have authority to issue declaratory and interpretive orders. An agency having such authority "in its sound discretion" may

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these regulations so drivers can continue to file tort claims,

issue a declaratory order to "terminate a controversy or remove uncertainty" under 5 U.S.C. 554(e). In addition, as was stated in Delegation of Authority- Declaratory order Proceedings, 5 I.C.C.2d 675-6 (1989), the Commission has exercised broad discretion in handling such requests, considering a number of factors, including significance to the industry and ripeness of the controversy. Here, as discussed above, there still appears to be a true controversy and uncertainty, as to the intent of our leasing regulations.

The Commission does not have any statutory authority to modify tort liability created and defined under state law. Consequently, the Commission could not, and did not, intend the leasing regulations to create additional causes of action under state law. These regulations are merely intended to make clear that when a vehicle is under a carrier's control through a lease, it is responsible for the safe operation of the vehicle. Conversely, when household goods carriers enter intermittent leases concerning vehicles owned by their agents, the lessee household goods carrier in not responsible for the safe operation of the vehicle when it has been surrendered back to the control of the agent, and is operated by the agent on its own behalf. we note,

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as well as collect workers' compensation.

however, that a lessee is not able to avoid liability where it would otherwise be liable under state law because it had negligently operated, maintained, or repaired equipment.

We believe that courts should be deciding suits of the nature described in the petition and comments here by applying the ordinary principles of state tort, contract, and agency law. The Commission does not intend that its leasing regulations supersede otherwise applicable principles of state tort, contract, and agency law and create carrier liability where none would otherwise exist. Our regulations should have no bearing on this subject. The Commission has discussed these matters before. Lease and Interchange of Vehicle (Ident. Devices), 3 I.C.C.2d 92, 93 (1986). Nevertheless, we repeat that our rules are not intended to influence, in any fashion, a court's liability determination.

It is ordered:

1. The petition to modify 49 CFR 1057.12(c) is denied.
2. This decision is effective on March 10, 1994.

Sidney L. Strickland, Jr.
Secretary
(SEAL)

APPENDIX

HOUSEHOLD GOODS MOVING INDUSTRY

1. Comments of petitioner American Movers Conference (AMA) filed December 10, 1992; supplemental AMA comments filed February 8, 1993.

2. Comments of Allied Van Lines, Inc. (Allied), filed December 10, 1992; supplemental Allied comments filed February 6, 1993.

3. Comments of Mayflower Transit, Inc. (Mayflower), filed December 10, 1992; supplemental Mayflower comments filed February 8,1993.

4. Comments of North American Van Lines, Inc. (NAVL), filed December 10, 1992; supplemental NAVL comments filed February 8, 1993.

5. Comments of United Van Lines, Inc. (United), filed December 10, 1992; supplemental United comments filed February 8, 1993.

6. Comments of Atlas Van Lines, Inc., filed February 6, 1993.

OTHER TRUCKING INDUSTRY COMMENTS

7. Comments of Dart Transit Company and Fleetline, Inc., filed December 7, 1992.

8. Comments of American Trucking Associations, Inc., and Interstate Truckload Carriers Conference, filed December 10, 1992.[10]

9. Comments of Owner-Operator Independent Drivers Assn., Inc., filed December 10, 1992.

10. Comments of Mainstream Trucking, Inc., filed February 9, 1993.

ACCIDENT RELATED COMMENTS AND INQUIRIES

11. Comments of Donna Michaud-Berger, filed December 8, 1992.

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[10] A footnote on the first page of the ATA-ITCC comments indicates that National Tank Truck Carriers, Inc., also joins in them.

12. Comments of Salwa H. Hanna, M.D., filed February 6, 1993.

13. Comments of The Institute For injury Reduction, filed February 8, 1993.

14. Comments of Citizens For Reliable and Safe Highways, filed February 9, 1993.

Letter-comments, generally in support of the accident victims' position, have been received from Senators Lieberman and Dodd, Connecticut; Senator Graham, Florida; Representative Johnston, Florida; and Representative Schroeder, Colorado.

I.C.C.

Fed. Carr. Cas. P 38,121, 1994 WL 70557 (I.C.C.)